



# OSHA INSTRUCTION

U.S. DEPARTMENT OF LABOR

Occupational Safety and Health Administration

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**DIRECTIVE NUMBER:** DIS 0-0.8

**EFFECTIVE DATE:**

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**SUBJECT:** Whistleblower Investigations Manual

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## ABSTRACT

**Purpose:** This manual sets forth policy, procedures and other information relative to the handling of discrimination complaints under the various “whistleblower” statutes delegated to OSHA. In its entirety, this manual is a ready reference for all staff in the performance of their daily duties.

**Scope:** OSHA-wide.

**References:** OSHA Instruction DIS .7, Referral of Section 11(c) Discrimination Complaints to "State Plan" States, February 27, 1986.

OSHA Instruction CPL 2.103, Field Inspection Reference Manual (FIRM), September 26, 1994.

**Cancellations:** DIS .4B, Revised Section 11(c)/405 Investigator's Manual, August 29, 1988, and subsequent changes, is hereby cancelled.

**State Impact:** This Instruction is not a Federal Program Change requiring State adoption or notice, but states are encouraged to consider its implications for their operations.

**Action Offices:** National, Regional and Area Offices.

**Originating Office:** Directorate of Compliance Programs, Office of Investigative Assistance

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By and Under the Authority of  
John L. Henshaw  
Assistant Secretary

## **Executive Summary**

OSHA Instruction DIS .4B, Revised Section 11(c)/405 Investigator's Manual, was originally written in 1988 to provide guidance for investigating complaints of discrimination under two "whistleblower" statutes, Section 11(c) of the Occupational Safety and Health Act and Section 405 of the Surface Transportation and Assistance Act. Prior to that time OSHA had been responsible for Section 11(c) only. However, since 1988 OSHA has been delegated responsibility for ten additional whistleblower statutes, each containing various differences and distinctions in the way the cases are processed and investigated. As a result, the original Revised Section 11(c)/405 Investigator's Manual underwent three separate changes, the last being issued in June 1997.

The most recent whistleblower statute to be delegated to OSHA is Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century (AIR21), which had not been included in OSHA Instruction DIS .4B. It is included here. Inasmuch as the original Manual was designed and written with only two statutes in mind and modified three times to accommodate additional delegations, and with the addition of yet another statute, it has become necessary to completely revamp the document to make it easier to read and follow. It is also now laid out in a fashion to more easily accommodate future changes and additions.

## **Significant Changes**

Other than the addition of the processing requirements of AIR21, no significant changes in policy are included except that the Regional Administrator is no longer authorized to delegate authority to issue determinations below the Assistant Regional Administrator or Area Director level.

This manual is intended to provide guidance regarding some of the internal operations of the Occupational Safety and Health Administration (OSHA) and is created solely for the benefit of the Government. No duties, rights, or benefits, whether substantive or procedural, are created or implied by this document. The contents of this manual are not enforceable by any person or entity against the Department of Labor (DOL) or the United States. Guidelines which reflect current precedents do not necessarily indicate acquiescence with those precedents.

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# Chapter 1

## Introduction

*Ya' gotta' start somewhere.*

**I. Purpose.** This instruction sets forth policy, procedures and other information relative to the handling of discrimination complaints under the various employee protection (whistleblower) statutes within the responsibility of OSHA. In its entirety, this manual is a ready reference for all staff in the performance of their daily duties.

**II. Scope.** This instruction applies OSHA-wide.

### **III. Significant Changes.**

- A. OSHA Instruction DIS .4B, Revised Section 11(c)/405 Investigator's Manual, was originally written in 1988 to provide guidance for investigating complaints of discrimination under two "whistleblower" statutes, Section 11(c) of the Occupational Safety and Health Act and Section 405 of the Surface Transportation and Assistance Act. Prior to that time OSHA had been responsible for Section 11(c) only.
- B. However, since 1988 OSHA has been delegated responsibility for ten additional whistleblower statutes, each containing various differences and distinctions in the way the cases are handled and processed. As a result, the original Revised Section 11(c)/405 Investigator's Manual underwent three separate changes, the last being issued in June 1997.
- C. The most recent whistleblower statute to be delegated to OSHA is Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century (AIR21), which had not been included in OSHA Instruction DIS .4B. It is included here.
- D. Inasmuch as the original Manual was designed and written with only two statutes in mind and modified three times to accommodate additional delegations, and with the addition of yet another statute, it has become necessary to completely revamp the document to make it easier to read and follow. It is also now laid out in fashion to more easily accommodate future changes and additions.
- E. Other than the addition of the processing requirements of AIR21, no significant changes in policy are included except that the Regional Administrator is no longer authorized to delegate authority to issue determinations below the Assistant Regional Administrator or Area Director level.

**IV. Cancellation.** DIS .4B, Revised Section 11(c)/405 Investigator's Manual, August 29, 1988, and subsequent changes, is hereby cancelled.

**V. References.** OSHA Instruction DIS .7, Referral of Section 11(c) Discrimination Complaints to "State Plan" States, February 27, 1986.

**VI. Action Information.** This manual shall be used as a primary vehicle for disseminating policy, procedures and information to whistleblower investigation staff. The policies and procedures contained herein shall be adhered to unless prior approval is given by the Regional Administrator in the event of unique local circumstances.

**VII. Federal Program Change.** This Instruction is not a Federal Program Change requiring State adoption or notice, but states are encouraged to consider its implications for their operations.

**VIII. Introduction.**

- A. The Occupational Safety and Health Act, Public Law 91-596, is a federal statute of general application designed to regulate employment conditions relating to occupational safety and health and to achieve safer and more healthful workplaces throughout the nation. By terms of the Act, every person engaged in a business affecting commerce is required to furnish each employee employment and a place of employment free from recognized hazards that are causing or likely to cause death or serious physical harm and, further, to comply with occupational safety and health standards promulgated under the Act.
- B. The Act provides, among other things, for the adoption of occupational safety and health standards, research and development activities, inspections and investigations of workplaces, and record keeping requirements. Enforcement proceedings initiated by the Department of Labor, review proceedings before an independent quasi-judicial agency (Occupational Safety and Health Review Commission), and judicial review are provided by the Act. In addition, States that desire to assume responsibility for development and enforcement of standards may submit plans to the Secretary of Labor and receive approval for such development and enforcement.
- C. Employees and representatives of employees are afforded a wide range of substantive and procedural rights under the Act. Moreover, effective implementation of the Act and achievement of its goals depend in large measure upon the active but orderly participation of employees, individually and through their representatives, at every level of safety and health activity. It is essential that such participation and employee rights be preserved if the fundamental purposes of the Act are to be realized.
- D. Section 11(c) of the Act provides, in general, that no person shall discharge or in any manner discriminate against any employee because the employee has exercised rights under the Act. Regional Administrators have over-all responsibility for the investigation of discrimination complaints under Section 11(c). They have authority to dismiss non-meritorious complaints (absent withdrawal), approve acceptable withdrawals, and negotiate settlement of meritorious complaints or effect recommendations of litigation to the Solicitor of Labor in such cases.



E. In addition to the over-all responsibility of enforcing Section 11(c) of the OSH Act, the Secretary of Labor has delegated to OSHA the responsibility to investigate claims of discrimination filed by employees under the provisions of eleven other “whistleblower” statutes as follows:

1. Section 31105 of the Surface Transportation Assistance Act (STAA)
2. Section 211 of the Asbestos Hazard Emergency Response Act (AHERA)
3. Section 7 of the International Safe Container Act (ISCA)
4. Section 211 of the Energy Reorganization Act (ERA)
5. Section 322 of the Clean Air Act (CAA)
6. Section 110 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).
7. Section 507 of the Federal Water Pollution Control Act (FWPCA)
8. Section 1450 of the Safe Drinking Water Act (SDWA)
9. Section 7001 of the Solid Waste Disposal Act (SWDA)
10. Section 23 of the Toxic Substances Control Act (TSCA)
11. Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century (AIR21)

In this manual, statutes number 5 through 10 above are collectively referred to as the “EPA statutes.”

## **IX. Functional Responsibilities.**

### **A. Responsibilities.**

1. Regional Administrator (RA). The RA has overall responsibility for all Whistleblower investigation and outreach activities. The RA is authorized to issue determinations and approve settlement of complaints filed under the various Whistleblower statutes. This authority may be re-delegated, but no lower than the Assistant Regional Administrator or Area Director level.
2. Supervisor. Under the guidance and direction of the RA or his/her delegate, the Supervisor (may also be called a Team Leader or Whistleblower Program Manager) is responsible for implementation of policies and procedures, and for the effective supervision of field Whistleblower investigations, including the following functions:

- a. Receives Whistleblower complaints from the National, Regional, and Area Office, Investigators, or other persons.
  - b. Ensures that safety and health or environmental ramifications are identified during complaint screening and, when necessary, makes referrals to the appropriate office or agency.
  - c. Schedules assignment of investigative cases to the individual Investigators.
  - d. May investigate and conduct settlement negotiations for cases that are unusual or of a difficult nature.
  - e. Provides guidance, assistance, supervision, and direction to the Investigators during the conduct of investigations and settlement negotiations.
  - f. Reviews investigation reports for comprehensiveness and technical accuracy. The Supervisor also recommends a determination to the RA.
  - g. At the direction of the RA, the Supervisor is responsible for coordinating and providing liaison with the Office of the Solicitor and other governmental agencies regarding discrimination matters within a geographic area.
  - h. Recommends to the RA changes in policies and procedures in order to better accomplish agency objectives.
  - i. As assigned by the RA, monitors and evaluates State Plan Whistleblower programs and investigates Complaints Against State Program Administration (CASPA) dealing with those programs.
  - j. Develops outreach programs and activities.
  - k. Provides field training for Investigators.
  - l. Performs necessary and appropriate administrative and personnel actions such as performance evaluations.
  - m. Performs other special duties as assigned by the RA and represents the Region to other agencies and the media as delegate of the RA.
3. Investigator. The Investigator carries out responsibilities under the direct guidance and supervision of the Supervisor which include, but are not limited to, the following functions:
- a. Conducts screening of incoming complaints to determine whether the allegations warrant field investigation.
  - b. Reviews case files in field offices for background information concerning any other proceedings which relate to a specific complaint.

- c. Interviews complainants and witnesses and obtains written statements as necessary and obtains supporting documentary evidence as available.
  - d. Follows through on leads resulting from interviews and statements.
  - e. Interviews and obtains written statements from respondents' officials, reviews pertinent records, and obtains relevant supporting documentary evidence.
  - f. Applying knowledge of the legal elements and evaluating the evidence revealed, writes an investigation report detailing the facts of the case, analyzing the evidence, and recommending appropriate action to the Supervisor.
  - g. Negotiates with the respondent in merit cases to obtain a settlement agreement which provides prompt resolution and satisfactory remedy.
  - h. Monitors implementation of agreements or court orders, as assigned, determining specific action necessary and sufficiency of action taken or proposed by the respondent. If necessary, recommends further legal proceedings to obtain compliance.
  - i. Assists and acts on behalf of the RA and Supervisor in Whistleblower matters with other agencies, OSHA Area Offices, and the general public and performs outreach activities.
  - j. Assists in the litigation process, including trial/hearing preparations and testifying in proceedings.
  - k. As assigned, monitors and evaluates State Plan Whistleblower programs and investigates Complaints Against State Program Administration (CASPA) dealing with those programs.
4. Office of Investigative Assistance (OIA). Under the direction of the Director, Directorate of Compliance Programs, the Office of Investigative Assistance responsibilities include, but are not limited to:
- a. Develops policies and procedures for the Whistleblower Program.
  - b. Processes appeals that are to be presented to the Appeals Committee under OSHA, AHERA, and ISCA.
  - c. Develops and presents formal training for Federal and State field staff.
  - d. Organizes annual national conferences.
  - e. Provides technical assistance and legal interpretations to the field investigative staff.
  - f. Maintains a law library of legal cases and decisions pertinent to Whistleblower investigations. Distributes significant legal developments to field staff.

- g. Maintains a statistical database on Whistleblower investigations.
  - h. Assists in developing legislation on Whistleblower matters.
  - i. Maintains the Whistleblower Webpage within the OSHA Intranet website.
  - j. Acts as liaison between the Whistleblower Program and other government agencies.
  - k. Conducts Regional audits of case files to ensure national consistency.
  - l. Assists in the investigation of complex cases or provides assistance in the investigation of such cases as requested by the RA.
5. Area Director (AD). Each AD is responsible for receiving Whistleblower complaints and promptly transmitting these complaints to the Supervisor and/or the Whistleblower Program Manager.
  6. Compliance Safety and Health Officer (CSHO). Each CSHO is responsible for maintaining a general knowledge of the protections under all relevant statutes. Using this knowledge, the CSHO may then advise employers and employees of their responsibilities and rights granted under such laws, receive complaints and expeditiously notify the AD of the receipt of a Whistleblower complaint.
  7. National Solicitor of Labor (NSOL). The National Solicitor of Labor provides assistance to the Regional Solicitors, gives advice to the Office of Investigative Assistance, and litigates on OSHA's behalf before the Administrative Review Board and on the Secretary's behalf before the courts of appeals. The Division of Occupational Safety and Health in NSOL provides legal services under OSHA, STAA, AHERA, and ISCA cases, including participation on the Appeals Committee. The Division of Fair Labor Standards in NSOL provides legal services under the ERA, EPA, ERA, and AIR21 cases.
  8. Regional Solicitor of Labor (RSOL). Each RSOL reviews cases submitted by the RA for their legal merits, makes decisions regarding those merits, and litigates those cases deemed meritorious as appropriate.
  9. Regional Attorney. The Regional SOL attorneys recommend actions on Whistleblower cases as assigned by the RSOL. They represent the Secretary in federal district court proceedings under the various statutes and the Assistant Secretary for Occupational Safety and Health in proceedings before DOL administrative law judges.

B. Personal Conduct and Activities.

1. Courtesy to the Public. The U.S. Department of Labor emphasizes that the proper and courteous discharge of duties and responsibilities by CSHO's and Investigators is essential to the effective administration of the law. The success of the program depends upon their knowledge and understanding of the laws and regulations as well as upon their courtesy and tact in dealing with employers and employees. Investigators represent the U.S. Government and must at all times conduct themselves in such a manner as to reflect that responsibility. They must never indulge in conduct unbecoming their positions, even when such conduct is invited or incited by those with whom they are dealing.
2. Correspondence with the Public. Investigators are the primary public relations representatives of the U.S. Department of Labor. All written correspondence received by Investigators from the public must be responded to in a prompt and courteous manner. The Investigator must respond to correspondence which is directed to an Investigator but which the Investigator must forward to a higher authority, other agency or person. The Investigator must notify the writer that the original correspondence is being forwarded for action by the authority, agency or person. Other inquiries received by Investigators which are outside the Investigator's scope of normal job activities must be forwarded to the Supervisor for appropriate action.
3. Acceptance of Gratuities. No OSHA employee shall solicit, accept or agree to accept, directly or indirectly, a favor, gift, loan, free service or other item of economic value in any form from any outside person, corporation or group which might reasonably be interpreted by others as being of such nature that it could affect impartiality if the employee has reason to believe that the person, corporation or group:
  - a. Has sought or is seeking to obtain contractual or other business or financial relationships with the U.S. Department of Labor.
  - b. Conducts operations or activities which are regulated by the U. S. Department of Labor.
  - c. Has interests which may be substantially affected by such employee's performance or nonperformance of official duty, or
  - d. Is attempting to reward or influence the employee's official actions.
4. Subpoenas and Testimony.
  - a. Subpoenas Served on Investigators. An Investigator, upon being served with a subpoena, must immediately communicate with the Supervisor or the RA and forward all pertinent information. The RA will refer the matter to the RSOL for action.

- b. Testifying in Proceedings. The Investigator may be required to testify in proceedings on behalf of the Government. The Investigator should keep this fact in mind when conducting an investigation and recording observations. Notes and reports must reflect conditions accurately and must be included in the case file. If the Investigator is called on to testify, the reports and notes will be invaluable as a tool for recalling actual conditions and statements and reinforcing the facts of the case.

5. Release of Investigation Information.

- a. Investigation materials include notes, work papers, memoranda, records, and audio or video tapes received or prepared by an Investigator concerning, or relating to the performance of any investigation, or in the performance of any official duties. Such original material and all copies must be included in the case file, where necessary, to support the investigative findings. These records are the property of the United States Government and a part of the case file. Under no circumstances are investigation notes and work papers to be destroyed or retained or used by an employee of the Government for any private purpose. This does not include copies of Final Investigation Reports retained by Investigators for their professional use and reference.
- b. The information and statements obtained from investigations are confidential except for those which may be released under the Freedom of Information Act (FOIA) and the Privacy Act or which must be released to provide due process under the preliminary reinstatement provisions of STAA and AIR21. Requests for the public release of any information must be directed to the Region's document custodian for release according to current FOIA law and agency policy.
  - 1) Cases under 11(c), AHERA and ISCA shall be considered open investigations until a final determination has been made as to whether litigation will be pursued. Under STAA, ERA, EPA and AIR21, a case file is "closed," within the meaning of FOIA, once OSHA has completed its investigation and issued its determination letter unless OSHA is participating as a party in the proceeding before the ALJ, or is recommending to RSOL that OSHA participate as a party in the proceeding.
  - 2) After the case is closed, much of the case file material is available for disclosure upon receipt of a FOIA request, a request from another federal agency, a request from an ALJ, or through discovery procedures. The entire narrative report, will normally be disclosed upon request, including interviews of officials representing the respondent, interviews of complainant (except the identity of confidential informants), and interviews of other individuals who have not requested confidentiality, after scrutiny for passages which might constitute an invasion of privacy of third parties.
- c. Any inquiry received by an Investigator concerning an investigation must be transmitted to the Supervisor or appropriate document custodian.

- d. The OSHA-82 or 87 form, Discrimination Case Activity Worksheet, may be released in open cases after consultation with the Supervisor.
- e. If, during the course of an investigation, the employer identifies any materials obtained as a trade secret or confidential commercial or financial information, and the Investigator has no reason to question such identification, information obtained in such areas will be labeled "Confidential Information." If the disclosure officer agrees with this characterization, it will not be disclosed except in accordance with the provisions of Section 15 of the Act or similar protections under the other statutes.

**X. Actions Required.** All OSHA offices will implement the policy and procedures contained in the Instruction.

# Chapter 2

## Complaint Intake and Investigation Programming

*Time invested with the complainant in the beginning  
will earn great dividends in the end.*

- I. **Scope.** This chapter explains the general process for receipt of whistleblower complaints under the various statutes, screening and docketing of complaints, initial notification to complainants and respondents, the scheduling of investigations, and recording the case data in OSHA's Integrated Management Information System (IMIS). Unique requirements for complaint-taking procedures, screening, coverage, timely filing, etc., which vary from statute to statute, will be discussed in the appropriate chapters.
- II. **Receipt of Complaint.** Any applicant for employment, employee, former employee or their authorized representative is permitted to file complaints under OSHA, STAA, AHERA, ISCA, and AIR21 either orally or in writing with any official of the U.S. Department of Labor. Complaints under the remaining statutes must be filed in writing with any official of the U.S. Department of Labor or the appropriate statutory agency. Complaints are usually received at the Area Office level but may originate at the Regional or National Office, or on referral by other government offices such as Congress or other administrative agencies.
  - A. When a complaint is received at an Area or Regional Office, basic information about the complaint must be recorded on a Form OSHA-82 or 87 by the receiving officer, and forwarded to the Supervisor immediately. Alternatively, the complaint may be referred by telephone to the Supervisor for intake. In every case the date of filing must promptly be recorded.
  - B. Complaints received at the National Office or through other governmental units normally are forwarded to the RA for completion of the OSHA-82 or 87.
  - C. Whenever possible, the minimum complaint information should include: the complainant's full name, address, and phone number; the respondent company's name, address, and phone number; date of filing; date of adverse action; a brief summary of the alleged discrimination addressing the elements of a violation (protected activity, respondent knowledge, adverse action, and a nexus); and, if known, whether a safety, health, or environmental complaint has also been filed with OSHA or other enforcement agency.
  - D. A complaint will be regarded as filed under the statute by which the alleged discriminatory act is covered. The complainant need not explicitly state the statute in the complaint. For example, a truck driver may mistakenly file a complaint under STAA regarding whistleblower activities that are in reality covered by an EPA statute rather than STAA. The complaint type must be correctly classified by the receiving office.



### III. Screening and Docketing.

- A. As soon as possible upon receipt of the complaint, the available information should be reviewed for appropriate jurisdictional requirements, timeliness of filing, and the presence of a *prima facie* allegation. This may require preliminary contact with the complainant to obtain additional information or to explain to the complainant why the case cannot proceed to investigation. Complaints which pass this initial screening will be docketed for investigation. The term "docket" means to formally notify both parties in writing of OSHA's receipt of the complaint and intent to investigate, to assign a case number, and to record the case in the IMIS.
- B. Complaints which do not involve protected activity, or are not filed within statutory time limits for OSHA, AHERA, and ISCA, will not be docketed if the complainant indicates concurrence with the decision to close the case administratively. If the complainant refuses to accept this determination, the case will be docketed and subsequently dismissed with appeal rights. Complaints which are not docketed, based on the initial screening, will not be assigned a case number or entered into the IMIS. A memorandum will be prepared documenting the screening interview, and the RA will send the complainant a letter verifying administrative closure of the case.
  - 1. Complaints filed under STAA, ERA, AIR21, or an EPA statute that are either untimely or do not present a *prima facie* case, **may not** be closed administratively. Rather, the situation will be explained to the complainant, and absent complainant's request to withdraw the complaint, the case will be docketed.
  - 2. If an OSHA complaint filed against an employer is solely under the jurisdiction of a state plan state, *e.g.* the complainant is a state or local government employee, the complaint will be referred to the state in accordance with 29 C.F.R. 1977.23, and the complainant will be so advised by letter. Such referrals will not be docketed or entered into the IMIS. Only OSHA complaints may be referred to the states.
- C. Cases that are assigned for investigation will be given a local case number which uniquely identifies the case. Case numbers will follow the format established in OSHA Instruction ADM 1-1.36, Discrimination IMIS Manual. All case numbers must follow the format 1-2222-33-444 where each series of numbers is represented as follows:
  - 1. The region number (Region 10 is 0).
  - 2. The area office city number (per the *World-wide Geographic Code Manual*)
  - 3. The fiscal year.
  - 4. The serial number of the complaint for the area office and fiscal year.

- D. As part of the docketing procedures when a case is opened for investigation, the Supervisor will send a letter notifying the complainant that the complaint has been reviewed, given an official designation (i.e., case name and number), and assigned to an Investigator. The name, address, and telephone number of the Investigator will be included in the docketing letter.
- E. Also at the time of docketing or as soon as appropriate, the Supervisor will prepare a letter notifying the respondent that a complaint alleging discrimination has been filed by the complainant and requesting that the respondent submit a written position statement. Failure to promptly forward the respondent letter could adversely impact the respondent's due process rights and the timely completion of the investigation.
  - 1. A Designation of Representative Form must be attached to this letter to allow the respondent the option of designating an attorney or other official representative.
  - 2. The respondent notification will be sent by certified mail, return receipt requested. Receipts will be stapled to the file copy of the letters to maintain accountability.
  - 3. Prior to sending this letter, the Supervisor must first determine if a compliance inspection is pending under OSHA or AIR21. If such an inspection is pending, and the agency requests a short delay, the notification letter will not be mailed until such inspection has commenced in order to avoid giving advance notice of a potential inspection.
- F. During periods of heavy case loads it may be appropriate to send the complainants a questionnaire for them to complete and return to the Investigator or Supervisor. Questionnaires may only be used upon the explicit approval of the Regional Administrator. The questionnaire must include any information already submitted by the complainant and be used only to obtain supplemental data. A sample questionnaire can be found at the end of this chapter.

#### **IV. Timeliness of Filing.**

- A. Whistleblower complaints must be filed within specified statutory time frames (see Table II-1) which generally begin when the adverse action takes place. If the discrimination is of a continuing nature, such as harassment or blacklisting, the time period begins when the last act of discrimination occurs. Generally, the date a complaint is considered filed is the day the complainant visits, emails, faxes or telephones a Department of Labor official. For complaints sent by mail, the date filed is the date of the post mark. If the post mark is absent or illegible, the date filed is the date the complaint is received. If the last day of the statutory filing period falls on a weekend or a federal holiday, or if Department of Labor Offices are closed, the next business day will count as the final day.

<b>Table II-1: Specific statutes and their filing deadlines</b>	
<b>Statute</b>	<b>Filing Deadline</b>
OSHA	30 days
all EPA statutes	30 days
ISCA	60 days
AHERA and AIR21	90 days
STAA and ERA	180 days

- B. Complaints filed after these deadlines will normally be closed without further investigation. However, there are certain extenuating circumstances which could justify tolling these statutory filing periods for equitable principles. (ERA, EPA, AIR21, and STAA complaints may not be screened out. If the complainant does not withdraw, negative findings must be issued if the complaint was untimely and there was no valid extenuating circumstance.) The present general policy is outlined below, but each case must be considered individually.
- C. An investigation must ordinarily be conducted if evidence establishes that a late filing was due to any of the following. (These circumstances are not to be considered all-inclusive, and the reader should refer to appropriate regulations and current case law for further information.)
1. The employer has actively concealed or misled the employee regarding the existence of the adverse action or the discriminatory grounds for the adverse action.
  2. The employee is unable to file within the statutory time period due to debilitating illness or injury.
  3. The employee is unable to file within the required period due to a natural disaster such as a snow storm or flood. Conditions should be such that a reasonable person, under the same circumstances, would not have been able to communicate with an appropriate agency within the filing period.
  4. The employee mistakenly filed a timely discrimination complaint with another agency that does not have the authority to grant relief to the whistleblower (e.g., an AIR 21 complaint is filed with FAA).
- D. Conditions which will not justify extension of the filing period are, among others:
1. Ignorance of the statutory filing period,
  2. Filing of unemployment compensation claims,

3. Filing a workers' compensation claim,
4. Filing a private negligence or damage suit,
5. Filing a grievance or arbitration action, or
6. Filing a discrimination complaint with a state plan state or another agency that has the authority to grant the requested relief.

## **V. Scheduling the Investigation.**

- A. The Supervisor will assign the case to an Investigator taking into consideration such factors as the Investigator's current caseload, work schedule, geographic location, and statutory time frames. The assignment will be documented by means of an assignment memorandum to the Investigator. In cases involving complex issues or unusual circumstances, the Supervisor may conduct the investigation or may assign a team of Investigators.
- B. As part of the case assignment process, the Supervisor will prepare a case file containing the original complaint and other evidentiary materials supplied by the complainant to be given to the investigator assigned. A duplicate case file will also be prepared and maintained by the Supervisor until the investigation is completed and returned to the Supervisor for review.
- C. The Investigator will generally schedule investigations in chronological order of date filed, taking into consideration economy of time and travel costs, unless otherwise directed by the Supervisor. Also, priority will be given to cases according to the statutory time frames shown in Table II-2 below.

<b>Table II-2 Statutory Investigation Time Frames</b>	
<b>Statute</b>	<b>Time Frame</b>
all EPA, ERA, ISCA	30 days
STAA, AIR21	60 days
OSHA, AHERA	90 days

### **D. Case Transfer.**

1. Careful planning must be exercised in the docketing of cases to avoid the need to transfer case responsibility from one Investigator to another. However, if caseload or case priority considerations warrant a transfer of cases, such transfer must be documented in the case file.
2. Only Supervisors are authorized to transfer cases among Investigators under their supervision. The transfer of cases between Investigators under separate Supervisors will be accomplished through coordination by the involved RA's.

- E. Investigative Assistance. When assistance from another Region is needed to interview witnesses or obtain evidence, the RA's will handle the coordination. The Investigator requiring assistance will contact the Supervisor, who will coordinate with the other region through the RA's as appropriate.

## **Sample Documents**

**from**

## **Chapter Two**

Administrative Closure Letter .....	<a href="#"><u>2-8</u></a>
Assignment Confirmation Memorandum .....	<a href="#"><u>2-9</u></a>
Complainant Notification Letter .....	<a href="#"><u>2-10</u></a>
Respondent Notification Letter .....	<a href="#"><u>2-11</u></a>
Designation of Representative Form .....	<a href="#"><u>2-12</u></a>
Followup Questionnaire .....	<a href="#"><u>2-13</u></a>

**U.S. DEPARTMENT OF LABOR**

**Occupational Safety and Health**

**Administration**

**Street Address**

**City and State**

**Telephone:**

**FAX:**



**Sample Administrative Closure Letter  
Section 11(c) Complaint**

Date

Mr. U. R. Complainant

Street Address

City, State ZIP

Dear Mr. Complainant:

This is to confirm your telephone conversation of April 1, 2002, with Ms. I. M. Investigator of my staff. It is my understanding Ms. Investigator explained to you that we are unable to pursue investigation of your claim because your complaint was not filed within the 30-day time period required by Section 11(c)(2) of the Occupational Safety and Health Act. Therefore, we are administratively closing our files on your claim.

I regret that we are unable to assist you further in this matter. Thank you for your interest in occupational safety and health.

Sincerely,

Name

Regional Administrator

**U.S. DEPARTMENT OF LABOR**

**Occupational Safety and Health  
Administration  
Street Address  
City and State**



**Telephone:  
FAX:**

**Sample Assignment Confirmation Memorandum  
Section 11(c) Complaint**

Date

MEMORANDUM FOR: U.R. Investigator

FROM: I.M. Supervisor

SUBJECT: ABC Company/Complainant/Case No. 1-2345-02-001

**ASSIGNMENT CONFIRMATION**

This is to confirm the assignment of the above case to you for investigation and processing as prescribed in OSHA policy and procedure statements. The complaint in this matter was filed on Date.

If you anticipate any problems in completing this case within the statutory time frames, or if any problems occur in the course of the investigation, contact me as soon as possible.





Telephone:  
FAX:

## Sample Complainant Notification Letter Section 11(c) Complaint

Date

Mr. U. R. Complainant  
Street Address  
City, State ZIP

Re: ABC Company/Complainant/Case No. 1-2345-02-001

Dear Mr. Complainant:

This is to acknowledge receipt of your complaint of discrimination under Section 11(c) of the Occupational Safety and Health Act. An investigator will get in touch with you as soon as possible to request your assistance in the investigation of your complaint. Please save any evidence bearing on your complaint, such as notes, minutes, letters, or check stubs, *etc.*, and have them ready when the investigator meets with you. It will be helpful for you to jot down a brief factual account of what has happened and for you to prepare a list of the names, addresses (including email), and telephone numbers of the potential witnesses, together with a brief summary of what each witness should know, for the use of the investigator.

You are expected to cooperate in the investigation of your complaint and failure to do so may cause your complaint to be dismissed due to lack of cooperation on your part.

Please address any questions, material, or change of your address or telephone number to the investigator, Name, address below.

Sincerely,

Name  
Supervisor

Investigator:

I. M. Investigator  
U.S. Department of Labor - OSHA  
Street Address  
City, State ZIP

Telephone: (123) 456-7890  
Fax: (123) 456-7890



Telephone:  
FAX:

## Sample Respondent Notification Letter Section 11(c) Complaint

Date

ABC Company  
Street Address  
City, State ZIP

Re: ABC Company/Complainant/Case No. 1-2345-02-001

Dear Sir or Madam:

We hereby serve you notice that a complaint has been filed with this office by Mr. U. R. Complaint alleging a violation of Section 11(c) of the Occupational Safety and Health Act, Public Law 91-596. Mr. Complainant alleges that he was fired for reporting his safety concerns to management. We would appreciate receiving from you promptly a full and complete written account of the facts and a statement of your position in response to the allegation that you have discriminated against Mr. Complainant in violation of the Act.

Attention is called to your right and the right of any party to be represented by counsel or other representative in this matter. In the event you choose to have a representative, please have your representative complete the "Notice of Appearance" Form enclosed and forward it promptly. All communications and submissions should be made to the investigator indicated below.

Voluntary adjustment of this matter can be effected through a settlement agreement. Your cooperation with this office is invited so that all facts of the case may be considered.

Sincerely,

Investigator:

I. M. Investigator  
U.S. Department of Labor - OSHA  
Street Address  
City, State ZIP

Name  
Supervisor

Telephone: (123) 456-7890  
Fax: (123) 456-7890

Enclosure

Sample Designation of Representative Form  
U.S. DEPARTMENT OF LABOR  
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

**DESIGNATION OF REPRESENTATIVE**

*COMPLAINANT'S NAME*

v.

Case Number:

*RESPONDENT'S LEGAL NAME*

TO: *Investigator's Name*  
*Address*  
*City, State, Zip*  
*Telephone number*

The undersigned hereby enters his appearance as representative of:

in the above captioned matter:

<p>_____ Signature of Representative</p> <p>_____ Type or Print Name</p> <p>_____ Title</p> <p>_____ Date</p>	<p>Representative's Address and ZIP Code</p> <p>_____ Area Code      Telephone Number</p> <p>E-mail address: _____</p>
---	--

Telephone:  
FAX:

## Sample Followup Questionnaire

**COMPLAINANT FOLLOW-UP QUESTIONNAIRE**

---

We are in receipt of your complaint dated June XX, 2001 alleging that discriminatory action has been taken against you. To assist us in better serving you, we request that you complete this follow-up questionnaire. Please correct any misinformation that has been recorded or provide us with information that is missing. You may also submit copies of any documentation such as (1) discharge slips, (2) pay stubs, (3) performance evaluations, and/or any other evidence which you believe support your claim. Please note that failure to return this completed form, to the address noted above, as soon as possible may result in a delay of our investigation and closing of your file.

**Please print in black or blue ink, or type**

## 1. Complainant Information: (Please notify this office immediately of any change)

Name: John Doe  
Address: 200 Smith Street  
Anywhere, PA 12345Contact Telephone Number: (800) 555-1212

## 2. Respondent Information:

Company Name: I.M. Employer  
Address: 200 Smith Lane  
Address: Somewhere, PA 12345Company Representative: Ms. Sue P. Visor, Officer Manager  
Contact Telephone Number: (800) 555-1213

3. How many employees worked with you at this company or job site: \_\_\_\_\_

4. What kind of business is this, e.g., manufacturer, construction, shipping, transportation, agriculture?

\_\_\_\_\_  
—

5. Do you belong to a Union? If so, what is the Name, Local, and Representative name and telephone number?

\_\_\_\_\_  
—

6. What was the first date of your employment? \_\_\_\_\_

7. What was your last date of employment, if applicable? June XX, 2001

Complainant Questionnaire  
Page 2

8. What was your job title? \_\_\_\_\_

9. Briefly describe your job duties and responsibilities: \_\_\_\_\_

-

10. What type of adverse action was taken against you, e.g., termination, suspension, lay-off?

I was suspended for 2 days and then fired

—

11. What was your final wage rate? \$ \_\_\_\_\_ per (Circle one) Hour / Week / Month / Year

12. What was the date of this adverse action? June XX, 2001

13. What was the average number of hours that you worked per week? \_\_\_\_\_

14. What is the name and job title of your immediate supervisor: \_\_\_\_\_

—

15. In your opinion, *why* did your employer take adverse action against you? \_\_\_\_\_

—

16. Do you have a copy of anything in writing regarding the termination, lay-off, etc?

Circle one: **YES** **NO** *If YES, send a copy of it to OSHA.*

17. Did you make any complaints to your employer? Circle one: **YES** **NO**

18. What did you complain about? \_\_\_\_\_

-

—

19. Whom did you complain to? Name: \_\_\_\_\_ Job Title: \_\_\_\_\_

20. When was your most recent complaint made? \_\_\_\_\_

21. Did anyone else hear you complain to the employer? If so, what is this person(s) name and telephone number: \_\_\_\_\_

\_\_\_\_\_

—

22. If you filed a safety/health complaint(s) with OSHA or any other agency (such as the DOT, DOE, EPA, NRC, FAA a state enforcement agency, or the company's safety program) describe the complaint and which agency and which office of the agency (include phone number) you complained to:

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23. What was the date(s) that you filed this safety/health complaint: \_\_\_\_\_

24. Does anyone at work know that you filed a complaint? If so, list his/her name and telephone number:

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25. Does management know that you filed a safety/health complaint? If yes, why do you think or suspect that they know?

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26. Did OSHA (or other agency) *conduct an inspection* at your work site? If so, what was the date of the inspection, and its outcome?

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27. If you *refused* to do a work assignment, describe WHY you refused to do it, and what assignment did you refuse to do:

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---

28. Who did you voice your refusal to? Name: \_\_\_\_\_ Job Title: \_\_\_\_\_

29. When did you refuse the job assignment? Date: \_\_\_\_\_ Time: \_\_\_\_\_

30. Had you done this work assignment before? Circle one: **YES** **NO**

31. When was this? Date(s) \_\_\_\_\_ How was the work assignment different this time?

—



32. Did you call OSHA *before* you refused to do the work assignment? If no, why not? Was there time to call OSHA? \_\_\_\_\_

—

33. Were you offered other work to do? If yes, what was it? \_\_\_\_\_

—

34. Did you ask your supervisor if you could perform another task rather than the one you refused? If yes, what happened? \_\_\_\_\_

—

35. Have you worked since leaving this employment? If so, where? \_\_\_\_\_

—

36. Have you looked for another job since leaving this employment? Circle one: **YES** **NO**

37. What will the employer say is the reason the adverse action was taken against you? \_\_\_\_\_

—

38. Does this complaint involve *commercial motor vehicle safety*? Circle one: **YES** **NO**

**NOTE: If "NO," go to item # 44. If "YES," please answer items 39 through 44.**

39. Does the vehicle have a gross weight rating or gross vehicle weight of 10,001 or more pounds?

Circle one: **YES** **NO**

40. Is the vehicle designed to haul more than 10 passengers, including the driver?

Circle one: **YES** **NO**

41. Does the vehicle haul any hazardous materials that require a placard?

Circle one: **YES** **NO**

42. Is the vehicle driven on interstate highways or roads leading to interstate highways?

Circle one: **YES** **NO**

43. Is the vehicle driven across state lines?

Circle one: **YES** **NO**

44. Does the vehicle contain passengers, cargo or fuel from out-of-state?

Circle one: **YES** **NO**

45. If your employment was terminated, are you interested in returning to work for your previous employer? Circle one: **YES**   **NO**

46. In the box below, list names and telephone numbers of witnesses who can support your claim. Be sure to print clearly:

Witness Name	Telephone Number with Area Code

47. Additional comments (Please feel free to attach additional pages, if necessary):

—

—

—

—

—

—

***ATTENTION! READ THE FOLLOWING SENTENCE CAREFULLY BEFORE SIGNING!***

I certify that the responses in this questionnaire are true and correct to the best of my knowledge and acknowledge that knowingly providing false information may subject me to the penalties outlined in Section 17(f) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §666(g), and 18 U.S.C. §1001, and may negatively impact the outcome of my case.

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

**RETURN THIS AS SOON AS POSSIBLE TO:**

**Mr. I.M. Supervisor**  
**Regional Supervisory Investigator**  
**U.S. Department of Labor/OSHA**  
**Street Address**

City, State Zip  
Telephone Number  
Fax Number

# Chapter 3

## Conduct of the Investigation

*It's an art more than a science.*

**I. Scope.** This chapter sets forth the policies and procedures Investigators must follow during the course of a discrimination investigation. It does not attempt to cover all aspects of a thorough discrimination investigation, and it must be understood that due to the extreme diversity of cases that may be encountered, professional discretion must be exercised in situations that are not covered by these policies. To the extent that statutes and their regulations, such as those under STAA, mandate specific procedures, those procedures must be followed if there is any conflict with the procedures in this chapter. Investigators should consult with their Supervisor when additional guidance is needed.

### II. Case File.

- A. Original Evidentiary Material. The Investigator will normally receive a standard case file containing the OSHA-82 or 87, transmittal memorandum, copies of initial correspondence to the complainant and respondent, and any other evidentiary material initially supplied by the complainant. A copy of the original materials will also be maintained by the supervisor in an open-case file. Upon completion of the case, the supervisor's copy may be consolidated with the original and/or destroyed.
- B. Organization of Evidence. The Investigator will arrange the case file with evidentiary materials on the right side of the folder and administrative materials on the left. Where practical, the evidence is to be organized in chronological order. Further, detailed guidance regarding proper case file organization may be found in Chapter 5, Report Writing and Case File Documentation.

### III. Preliminary Investigation.

- A. When initially receiving the Whistleblower case, it is important to confirm that the complaint is valid and is covered under one of the Whistleblower statutes OSHA investigates. This initial review should confirm that the complaint is timely filed, that a *prima facie* allegation is present under one of the statutes, and that the case has been properly docketed with notification to both parties.
- B. The Investigator may also check on prior or current discrimination or safety and health cases related to either the complainant or employer. Such information normally will be available from the IMIS or the Area Office, and can best be obtained by telephone or a personal visit. This enables the Investigator to coordinate related investigations and to obtain additional background data pertinent to the case at hand. Examples of information to be sought during the pre-investigation research phase are:
  - 1. Copies of safety and health or environmental complaints filed with OSHA or other agencies.

2. Safety and health or environmental enforcement actions, including inspection reports, which were recently taken against the employer.
  3. Copies of the safety and health or environmental inspector's notes.
  4. Interviews and signed statement of the inspector.
  5. Information on previous Whistleblower complaints.
- C. Coordination with Other Agencies. If information received during the investigation indicates that the complainant has filed a concurrent Whistleblower charge or a safety and health or environmental complaint with another government agency (such as DOT, NLRB, EPA, NRC, FAA, DOE, etc.), the Investigator may wish to contact such agency to determine the nature, status, or results of that complaint. This coordination may discover valuable information pertinent to the Whistleblower complaint, and may, in certain cases, also preclude unnecessary duplication of government investigative efforts.

#### **IV. The Field Investigation.**

- A. Burden of Proof. In the course of any investigation it is important to bear in mind the elements of a violation and the burden of proof required of each party as if the case were being heard before a judge. It is on this basis that relevant and sufficient evidence should be identified and developed to reach an appropriate determination of the case. During all phases of the investigation, the Investigator must bear in mind and look for evidence dealing with the following elements of a violation:
1. Protected Activity. It must be established that the complainant engaged in activity protected by the specific statute(s) under which the complaint was filed.
  2. Employer Knowledge. The respondent must be shown to have been aware, or suspect, that the complainant engaged in protected activity.
  3. Adverse Action. The evidence must demonstrate that the complainant suffered some form of adverse action, including but not limited to, discharge, demotion, reprimand, harassment, lay-off, failure to hire, or failure to promote.
  4. Nexus. A causal link between the protected activity and the adverse action must be established. This may involve one or more of several indicators such as animus (exhibited animosity) toward the protected activity or safety and health, proximity in time between the protected activity and the adverse action (timing), disparate treatment of the complainant compared to other similarly situated employees, false testimony or manufactured evidence, pretextual defenses by the respondent, *etc.*
  5. Employer Defense. After the *prima facie* case is established, the respondent must, to prevail, produce some evidence that the adverse action was motivated by a legitimate non-discriminatory reason, *e.g.*, poor work, absenteeism, misbehavior, or economic lay off. If the respondent produces this evidence, OSHA or the

complainant must show by a preponderance of the evidence that the real reason for the adverse action was the protected activity. This may be inferred by showing that the legitimate non-discriminatory reason was pretextual, e.g., the non-safety related misconduct did not occur, other employees engaged in similar misconduct known to management were not similarly punished (disparate treatment), the misconduct played no role in the adverse action, “but for” the protected activity the adverse action would not have occurred, or the misconduct was minor.

6. Dual Motive. If it is determined that a respondent's adverse treatment of a complainant was motivated both by illegal and legitimate reasons, then the dual motive test becomes applicable. The dual motive analysis is used where there is direct evidence of a link between an improper motive and the challenged employment decision. Direct evidence includes, among other things, statements by management that express hostility towards the complainant’s protected activity. Under the dual motive test, the respondent, in order to avoid liability, has the burden of persuasion to show by a preponderance of the evidence that it would have reached the same decision despite the protected activity.
7. As a general rule, to successfully develop the essential elements of the case, the Investigator will:
  - a. Determine the complainant's allegations,
  - b. Corroborate the allegations through witnesses and other evidence,
  - c. Determine the respondent's answer to the allegations and defenses,
  - d. Corroborate the respondent's response,
  - e. Determine the complainant's answer to the respondent’s defense, and
  - f. Corroborate the complainant's answer to resolve all discrepancies.
- B. Initial Contact with Complainant. The initial contact with the complainant must be made as soon as possible after receipt of the case assignment. Contact must be made even if the Investigator's caseload is such that actual field investigation will be delayed.
  1. Activity/Telephone Log. All telephone calls made during the course of an investigation must be accurately documented in the activity/telephone log. Not only will this be a helpful chronology and reference for the Investigator or any other reader of the file, but the log may also be helpful to resolve any difference of opinion concerning the course of events during the processing of the case. (A sample of the activity/telephone log is included at the end of this chapter.) If a telephone conversation with the complainant is lengthy and includes a significant amount of pertinent information, the Investigator should document the content of this contact in a “Memo to File” to be included as an exhibit in the case file. In this instance, the telephone log may simply show the nature and date of the contact, the number called, and the comment “See Memo - Exhibit #.”

2. Early Dismissal. If the Investigator determines that the complainant does not have allegations which are appropriate for investigation under the covered statutes, but may have a *prima facie* case under the jurisdiction of other governmental agencies, the complainant should be referred to those other agencies as appropriate for possible assistance.
3. Unable to Locate Complainant. In situations where an Investigator is having difficulty locating the complainant to initiate or continue the investigation, the following steps must be taken:
  - a. Telephone the complainant at different hours during normal work hours and in the evening.
  - b. Mail a certified, return-receipt-requested letter to the complainant's last known address requesting that the Investigator be contacted within 10 days of the receipt of the letter or the case will be dismissed. If no response is received within 10 days, the Supervisor will terminate the investigation and the case will be dismissed.
- C. Field Investigation. If, after the initial telephone contact with the complainant, it appears that the complainant has presented a *prima facie* allegation, the Investigator will proceed with a field investigation. Personal interviews and on-site collection of documentary evidence will be conducted when practical. In certain circumstances, testimony and evidence may be obtained by telephone, mail, or electronically. If a conversation is recorded electronically, the Investigator must be a party to the conversation, or the witness must have given prior consent to the recording. See 18 U.S.C. §2511(2)(d). This does not apply to other tape recordings supplied by the complainant or witnesses; however, all electronically recorded interviews or other voice recordings must be transcribed if they are to be used as evidence.
- D. Complainant Interview. The Investigator will arrange to meet with the complainant as soon as possible in order to interview and obtain a signed statement detailing the complainant's allegations. Such a record is highly desirable and useful for purposes of case review, subsequent changes in the complainant's status, possible later variations in testimony, and documentation for potential litigation. The complainant may, of course, have an attorney or other personal representative present at any time.
  1. If, at this point or at any later stage in the investigation, it can be conclusively shown that a *prima facie* case cannot be developed, the investigation will be terminated.
  2. The complainant's side of the investigation must be developed as thoroughly as possible. When writing the complainant's statement, it is usually practical to organize the testimony in a chronological order, outlining pertinent data and events from the time of the employee's hiring through the date of the adverse action, as well as subsequent developments. While much care should be taken to cover the essential elements of a discrimination case as outlined above, the complainant should be encouraged to talk freely about his/her concerns and experiences on the job, as important information may be revealed that might be missed in a generic



"investigative outline" style of interview. An interview is an interactive process of questions and answers. A complainant or witness should never be instructed to submit a statement or fill out a questionnaire without engaging in this process.

3. The complainant should be encouraged to identify as many witnesses as possible, including names, home addresses, and phone numbers if available, as well as a summary of specifically what each witness might be able to testify to in support of the complainant's allegations.
4. The complainant must be requested to furnish all documentation in his/her possession relevant to the case. Such documentation might include:
  - a. Copies of any discharge notices, reprimands, warnings or personnel actions,
  - b. Performance appraisals,
  - c. Earnings and benefits statements,
  - d. Grievances,
  - e. Unemployment benefits claims and determinations,
  - f. Job position descriptions,
  - g. Company employee and policy handbooks,
  - h. Copies of any charges or claims filed with other agencies or personal attorneys,
  - i. Medical records, or
  - j. Collective bargaining agreements.
5. It should be ascertained during the interview what restitution the complainant is seeking. If terminated or laid off by the respondent, the complainant should be advised of his/her obligation to search for work, except after preliminary reinstatement orders have been issued by the RA or ALJ in STAA and AIR21 cases, and to keep records of interim earnings. Failure to do so might result in a reduction of any back pay to which the complainant might be entitled in the event of future settlement or litigation, should the case be found meritorious. The complainant should be advised that the respondent's back pay liability ordinarily ceases when the complainant refuses a *bona fide*, unconditional offer of reinstatement. The complainant should also retain documentation supporting any other claimed losses resulting from the adverse action, such as medical bills, repossessed property, etc.
6. If the complainant is not personally interviewed and his/her statement is taken telephonically, a detailed Memo to File will be prepared relating the complainant's testimony. If necessary, this information may be transferred to an official statement form, and mailed to the complainant with instructions to review the document carefully, make any necessary corrections or additions, sign and return. Cases recommended for litigation must have in-person interviews of the complainant and pertinent witnesses in order to assess credibility and demeanor, and to ensure availability and willingness of witnesses to testify.

E. Contact Respondent.

1. Sometimes, after receiving the notification letter that a complaint has been filed, the respondent may call the Investigator to discuss the allegation or inquire about

the investigative procedure. The call should be noted in the telephone log, and if pertinent information is conveyed during this conversation, the Investigator should document such in the telephone log or in a Memo to File.

2. In many cases following receipt of the Supervisor's notification letter, respondent will forward a written position statement, which may or may not include supporting evidence. In some instances, the material submitted may be sufficient to adequately document the company's official position. Generally, however, the Investigator will still need to contact the respondent to interview witnesses, review records and obtain documentary evidence, or to further test respondent's stated defense.
3. If the respondent requests time to consult legal counsel, the Investigator will advise that future contact in the matter will be through such representative. The Designation of Representative form should be completed by counsel to document his/her involvement.
4. In the absence of a signed Designation of Representative, the Investigator is not bound or limited to making contacts with the respondent through any one individual or other designated representative (e.g., safety director). If a position letter was received from the respondent, the Investigator will contact the person who signed the letter.
5. The Investigator should interview all company officials who have known direct involvement in the case and attempt to identify other persons (witnesses) at the employer's facility who may have knowledge of the situation. Witnesses must be interviewed individually to obtain the best testimony.
  - a. In this regard, if the respondent has designated an attorney to represent the company, interviews with management and supervisory officials should ordinarily be scheduled through the attorney, who may be present during any interviews of the management and supervisory witnesses.
  - b. Respondent's attorney does not, however, have the right to be present, and should not be present, during interviews of non-management or non-supervisory employees.
  - c. Any respondent or other witness may, of course, have a personal representative or attorney present at any time.
  - d. There may be circumstances where there is reason to interview management or supervisory officials outside of the presence of counsel or other officials of the company, such as where the official has information helpful to the complainant and does not wish the company to know he or she is speaking with the Investigator. In such event, an interview should ordinarily be scheduled away from the premises.
6. While at the respondent's establishment, the Investigator should make every effort to obtain copies of, or at least review and make notes on, all pertinent data and

documentary evidence which respondent offers and which the Investigator construes as being relevant to the case.

7. If at any time during the initial (or subsequent) meeting with respondent, management officials, or counsel, respondent suggests the possibility of an early resolution to the matter, the Investigator should immediately and thoroughly explore how an appropriate settlement may be negotiated and the case concluded. (See Chapter 6 regarding settlement techniques and adequate agreements.)
  8. If necessary, subpoenas may be obtained for testimony or records when conducting an investigation under §11(c) of the OSH Act and AHERA. Subpoenas should be obtained following procedures established by the Regional Administrator.
  9. If the respondent fails to cooperate or refuses to respond, the Investigator will evaluate the case and make a determination based on the information gathered during the investigation.
- F. Early Joint Review with the RSOL. If in the early stages of the investigation of cases under OSHA, AHERA, ISCA, and STAA and AIR21 (where preliminary reinstatement may be ordered), and in other cases where OSHA may recommend that RSOL participate in the case, where the Investigator and the Supervisor believe there is evidence that the complainant's allegation has merit and may not be easily settled, the SOL should be contacted and briefed on the case.
1. Early RSOL involvement will help direct the course of the investigation, and ensure that proper documentation is gathered to help the RSOL in a successful litigation. Early involvement of the RSOL will also facilitate a faster litigation process.
  2. With RSOL assurance that the case will likely go forward, the Investigator may take a stronger position with the respondent during investigative meetings or the closing conference and negotiate a better settlement.
  3. Of equal importance in this "pipeline" procedure are those cases which the Investigator or Supervisor thinks are worthy, but which the RSOL believes are not suitable for litigation. Early discussion may resolve the differences and prevent needless RSOL review of the case. This may also obviate the need for further investigative efforts if the case is considered inappropriate for litigation, thus precluding unnecessary expenditure of government resources and a speedier conclusion of the investigation.
- G. Further Interviews and Documentation. It is the Investigator's responsibility to fairly pursue all appropriate investigative leads which develop during the course of the investigation, with respect to both the complainant's and the respondent's positions. Contact must be made whenever possible with all relevant witnesses, and every attempt must be made to gather all pertinent data and materials from all available sources.

1. The Investigator must attempt to obtain a signed statement from each relevant witness. Witnesses will be interviewed separately and privately to avoid confusion and biased testimony and to maintain confidentiality. The respondent has no right to have a representative present during the interview of a non-managerial employee. If witnesses appear to be "rehearsed," intimidated, or reluctant to speak in the workplace, the Investigator may decide to simply get their names and home telephone numbers and contact these witnesses later, outside of the workplace. The witness may, of course, have an attorney or other personal representative present at any time.
  2. In the event that a signed statement cannot be obtained from a witness, interview notes should be taken and a memorandum to the file subsequently prepared by the Investigator setting forth all pertinent information obtained verbally from the witness.
  3. The Investigator will attempt to obtain copies of appropriate records and other pertinent documentary materials as required. If this is not possible, the Investigator will review the documents, taking notes or at least obtaining a description of the documents in sufficient detail so that they may be subpoenaed or later produced during proceedings.
  4. In cases where the complainant is covered by a collective bargaining agreement, the Investigator should interview the appropriate union officials, and obtain copies of grievance proceedings or arbitration decisions specifically related to the discrimination case in question.
  5. When interviewing potential witnesses (other than officials representing the respondent), the Investigator should specifically ask if they request confidentiality. In each case a notation should be made on the interview form as to whether confidentiality is desired. Where confidentiality is requested, the Investigator should explain to potential witnesses that their identity will be kept in confidence to the extent allowed by law, but that if they are going to testify in a proceeding, the statement may need to be disclosed. Furthermore, they should be advised that their identity may be disclosed to another Federal agency, under a pledge of confidentiality from that agency.
- H. Resolve Discrepancies. After completing the respondent's side of the investigation, the Investigator will again contact the complainant and other witnesses as necessary to resolve any discrepancies or counter allegations resulting from contact with the respondent.
- I. Analysis. After having gathered all relevant evidence available, the Investigator must evaluate the evidence and draw conclusions based on the evidence and the law using the guidance given in subparagraph A above.
- J. Closing Conferences. Upon completion of the field investigation, and after discussion of the case with the Supervisor and SOL as necessary, the Investigator will conduct a closing conference with the complainant. This conference may be conducted with the complainant in person or by telephone. The Investigator should bear in mind that a

thorough, tactful closing conference is considered a very important and valuable step to effect a successful conclusion to the investigation. Assuring the complainant that his or her concerns have been fully explored and the investigative findings impartially evaluated will minimize the likelihood of appeals or objections, even though the complainant may not be totally satisfied or in agreement with the determination.

1. During the conference, the Investigator will discuss the case with the complainant, allowing time for questions and explaining how the recommended determination of the case was reached and what actions may be taken in the future.
  2. It is unnecessary and improper to reveal the identity of witnesses interviewed. If the complainant feels that certain witnesses should have been interviewed but were not, the Investigator will explain why the witnesses may not have been interviewed.
  3. If the complainant attempts to offer any new evidence or witnesses, this should be discussed in detail to ascertain whether such information is relevant, might change the recommended determination; and, if so, what further investigation might be necessary prior to final closing of the case. Should the Investigator decide that the potential new evidence or witnesses are irrelevant or would not be of value in reaching a fair decision on the case's merits, this should be explained to the complainant along with an explanation of why additional investigation does not appear warranted.
  4. During the closing conference, the Investigator must inform the complainant of his/her rights to appeal or objection under the appropriate statute (which vary, as described in following chapters), as well as the time limitation for filing the appeal or objection.
  5. The Investigator should also advise the complainant that the decision at this stage is preliminary and subject to review by higher management and/or the Solicitor.
  6. The closing conference will be documented in the case file either by an entry in the telephone log or a separate Memo to File. The closing conference will also be documented in the Final Investigation Report.
- K. Document File. With respect to any and all activities associated with the investigation of a case, Investigators must continually bear in mind the importance of documenting the file to support their findings. Time spent carefully taking notes and writing memoranda to file is considered productive time and can save hours, days, and dollars later when memories fade and issues become unclear. To aid clarity, documentation must be arranged chronologically where feasible.

## **Sample Documents**

**from**

## **Chapter Three**

Investigation Activity Log .....	<a href="#"><u>3-11</u></a>
Complainant's Statement .....	<a href="#"><u>3-12</u></a>
Respondent Witness Statement .....	<a href="#"><u>3-15</u></a>
Confidential Witness Statement .....	<a href="#"><u>3-16</u></a>
Memorandum to File .....	<a href="#"><u>3-17</u></a>

## Sample Investigation Activity Log



## Activity/Telephone Log

[illegible]

# Sample Complainant's Statement

## STATEMENT

I, Patrick J. Parker, reside at 1122 North Seventh Avenue in the City of Long Beach, state of California, ZIP Code 94000. My telephone number is (123) 456-7890.

I have been employed by O'Brien Drywall, Inc., located at 9876 Oak Street, Las Vegas, Nevada 56789, office telephone number (123) 456-7890. My job classification was apprentice carpenter.

I understand that my Social Security number, 123-45-6789, may be divulged for purposes of positive identification and to obtain interim earnings data in the event that it is necessary for the preparation of back pay specifications. _____(initial)
--

I started work for O'Brien Drywall on Monday, October 17, 1977, as a carpenter apprentice. I was hired through the union hall, Carpenters Local 123. I was working on the construction of a motel building in Long Beach installing fiber glass insulation and drywall. I earned \$8.75 per hour and worked 36 hours per week.

My very first day on the job I got fiber glass particles in my eye while working overhead. The bundles of fiber glass had fiber glass dust on them, and the bundles were sometimes ripped or cut to fit between the joists. Much of the work was overhead, and the fiber glass would fall in my eyes. After I was injured, a journeyman carpenter, Rick Dupree, took me to the water jug and washed out my eyes. The company had no eye wash or eye drops available for use.

After I got my eyes rinsed out I asked the foreman, Harry Briggs, for safety glasses and a respirator for my use. Briggs did not have either, but he borrowed a pair of plastic goggles from the electrical contractor. I wore the goggles for about two hours, but since the work was hard the goggles would steam up from my body heat and perspiration. I told Briggs that the goggles weren't working, and I returned them to the electricians. At my 2:30 p.m. break I again asked Briggs for safety glasses and a respirator. He asked me where he could get some, and I told him about a safety supply store about two miles away.



The next day I asked him again, but he never brought me the glasses or the respirator. I asked him at least twice a day for the rest of the week. On Thursday, October 20, 1977, I mentioned to a steward, James Crockett, about needing the safety equipment and Briggs' reluctance to get it for me. Crockett agreed that I needed the equipment and said he would talk to business agent, Rex Abner, to see what could be done.

On Friday, at about 12:00 noon another business agent, Kirk Kennedy, came on the job site and apparently talked with Briggs because at the 12:30 lunch break Briggs called Chet Nelson, the other apprentice, and me aside and asked us which one had called the business agent on him. Briggs was upset primarily because I had also complained to the union about a laborer doing carpenters' work. I told Briggs I was the one who had complained. Briggs said that if I caused him any more trouble he would have my check for me. He said that I didn't work for the union but that I worked for him. Briggs said that if I thought anything was needed on the job I should see him, not the union. I said fine and asked him when he would get me a pair of safety glasses and a respirator. He told me he was going to get me a pair over the weekend when he went back to Las Vegas but that he wasn't going to do it anymore because I had caused him enough trouble. I then went back to work and finished out the day.

I came back to work Monday morning and again asked for the safety equipment. He said he had not brought any for me. At lunch time I called OSHA to find out if the safety equipment was required by OSHA standards, but the Area Director was not in at the time. At my 2:30 break I called again and talked to Mr. Andrew Hunt, Area Director. I called from the prime contractor's trailer, and shortly after I began the conversation the superintendent, Joe (last name unknown) walked in. Joe sat down at the print table about five feet from me and could obviously overhear my conversation. I was telling Hunt about my job and about the fiber glass dust. I explained to Hunt that I had asked my foreman for safety equipment and was getting the runaround. I told Hunt that I was willing to file a written complaint. I then went back to work at the end of my break.

After only about 15 minutes a laborer, Thomas (Sam) Johnson told me that Briggs had told the laborers to get the place cleaned up because OSHA was coming out. For the rest of the time I was there, the laborers worked like crazy cleaning the place up. Everyone put their hard hats on and put extension cords away in preparation for the inspection. At about 3:45 p.m. Briggs came up to me and gave me my paycheck. He said he was going to have to go along with the "ratio thing" and let me go. He then said, "And I'll tell you another thing. Nobody calls OSHA on me." I said fine and left. By "ratio thing" Briggs was referring to the ratio of apprentices to journeymen. The union contract requires that an employer hire two journeymen before hiring an apprentice and seven journeymen before hiring a second apprentice. There were only six journeymen at the time I was hired and only six all week long. It was my understanding that Briggs had told Abner that he was bringing another journeyman with him from Las Vegas to make the seventh journeyman. Abner told me on Tuesday, October 18, that he was going to let the situation ride for a while and not complain about it. Briggs was apparently satisfied with my work otherwise because he never criticized my work the whole time I was there. In fact, he had asked me to go with him on another job after this one was finished.

I have read and had an opportunity to correct this statement consisting of three typed pages, and these facts are true and correct to the best of my knowledge and belief. Section 17(g) of the Occupational Safety and Health Act of 1970 and 18 U.S.C. §1001 make it a criminal offense to knowingly make a false statement or misrepresentation in this statement.

\_\_\_\_\_  
(signature)

Patrick J. Parker, Complainant

Witnessed by:

\_\_\_\_\_  
(signature)

\_\_\_\_\_  
(Date)

I.M. Investigator

\_\_\_\_\_  
(Date)

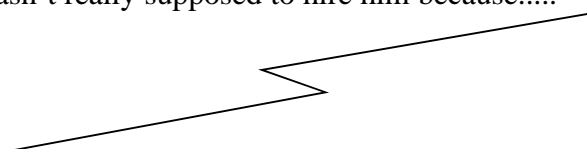
# Sample Respondent Witness Statement

## STATEMENT

I, Harry Briggs, reside at 100 Gold Bar Avenue, Las Vegas, Nevada 56789. My telephone number is (123) 456-7890. I have been employed by O'Brien Drywall, Inc., located at 9876 Oak Street, Las Vegas, Nevada 56789, office telephone (123) 456-7890. My job classification is foreman.

I started work for O'Brien Drywall in 1960 as a drywall hanger. In 1971, the owner, Mr. David O'Brien made me one of several job foremen that he has working for him. As foreman, I am responsible for all aspects of the job I am assigned. In late September 1977, Mr. O'Brien sent me on a motel building job in Long Beach, California. Normally, I take my own crew on all jobs, but at this one I only had two of my regular journeymen available to go to Long Beach, so I hired four additional journeymen and two apprentices from the local union hall.

One of the apprentices I hired was Pat Parker. Parker first started the job in about mid-October. I wasn't really supposed to hire him because.....



.....Parker's so-called safety complaints had nothing to do with the reason I let him go. As I said above, I had to lay Parker off to comply with the local union contract.

I have read and had an opportunity to correct this statement consisting of two typed pages, and these facts are true and correct to the best of my knowledge and belief. Section 17(g) of the Occupational Safety and Health Act of 1970 and 18 U.S.C. §1001 make it a criminal offense to knowingly make a false statement or misrepresentation in this statement.

Witnessed by: (signature)  
Harry Briggs

(signature) \_\_\_\_\_

I.M. Investigator (Date)

\_\_\_\_\_

(Date)

# Sample Confidential Witness Statement

## STATEMENT

I, Chet Nelson, reside at 111 Coast Avenue, Long Beach, California 12345. My telephone number is (123) 456-7890. I have been employed by O'Brien Drywall, Inc., located at 9876 Oak Street, Las Vegas, Nevada 56789, office telephone (123) 456-7890. My job classification was apprentice carpenter.

I understand that this statement will be held in confidence until such time as I may be called to testify in a court proceeding, at which time it may be produced upon demand of opposing counsel. Additionally, this statement may be made available to other agencies if it will assist them in the performance of their statutory functions. \_\_\_\_\_(initial)

I started work for O'Brien Drywall the first part of October 1977 as a carpenter apprentice. I worked with one other apprentice named Patrick Parker. I knew Parker somewhat from seeing him around the union hall and on the job site. I knew that.....

.....and so it was clear to me that Parker was actually laid off because he had called OSHA.

I have read and had an opportunity to correct this statement consisting of two typed pages, and these facts are true and correct to the best of my knowledge and belief. Section 17(g) of the Occupational Safety and Health Act of 1970 and 18 U.S.C. §1001 make it a criminal offense to knowingly make a false statement or misrepresentation in this statement.

Witnessed by:

\_\_\_\_\_  
(signature)

I.M. Investigator

\_\_\_\_\_  
(Date)

\_\_\_\_\_  
(signature)

Chet Nelson

\_\_\_\_\_  
(Date)



Telephone:  
FAX:

## Sample Memorandum to File In Lieu of Witness Statement

Date

MEMORANDUM FOR: File

FROM: I.M. Investigator

SUBJECT: O'Brien Drywall, Inc. / Parker / Case No. 1-2345-78-001

On November 23, 1977, the undersigned interviewed Mr. Richard Dupree, 999 State Street, Long Beach, California 12345, telephone (123) 456-7890. In response to questions posed, Mr. Dupree stated substantially as follows:

I was hired by O'Brien Drywall, Inc. in late September 1977 as a journeyman carpenter. I worked installing insulation and drywall at a motel construction site in Long Beach. About mid-October an apprentice named Pat Parker started work on the project helping to install fiberglass insulation. Parker was carrying bundles of insulation, opening them and helping to install the insulation in the ceiling. On his first day at work, he got some fiberglass in his eye, and I helped him flush it out using the drinking water. The company had no eyewash equipment available on the job site.

After that I know Parker asked the foreman, Harry Briggs, for a pair of safety glasses and a dust mask, but I don't recall ever seeing Parker wearing them. Parker only worked for about two weeks. Briggs later told us that he had to lay Parker off because the ratio of apprentices to journeymen was not according to the union contract. I had heard from others that Parker was fired for calling OSHA, but I have no direct knowledge of what Parker actually did or why he was terminated.

The above is true and correct to the best of my recollection.

(signature)  
I.M. Investigator

# Chapter 4

## Case Disposition

*A successful investigation is one that reveals the truth of the situation in a timely manner and correctly applies the law to arrive at the proper case disposition. This should result in appropriate remedy to employees whose rights were violated and no remedy to those whose rights were not violated.*

**I. Scope.** This chapter sets forth the policies, procedures and format for writing the Final Investigation Report (FIR). It includes procedures for arriving at a determination on the merits of a Whistleblower case; policies regarding withdrawal, settlement, dismissal, appeals, and litigation; adequacy of remedies; and agency tracking procedures for timely completion of cases.

### **II. Preparation.**

- A. Investigator Reviews the File. After completing the investigation, the Investigator must thoroughly review the file and its contents to collate and organize all pertinent data in preparation for writing the Final Investigation Report (FIR). When appropriate, the Investigator may wish to discuss the case with the Supervisor prior to writing the FIR.
- B. Investigator and Supervisor Discuss the Case. Once the Investigator has thoroughly reviewed the file and compiled all pertinent data, the Supervisor may be contacted to discuss the facts and merits of the case prior to writing the FIR. The Supervisor can advise the Investigator of any issues and, as appropriate, assist in reaching a decision on the merits or decide whether additional investigation is necessary.

**III. Final Investigation Report.** The Investigator will report the results of the investigation by means of the Final Investigation Report following the policies and format described in detail in Chapter 5 of this Manual.

### **IV. Case Review and Recommendation by the Supervisor.**

- A. Review. Upon receipt of the completed investigation case file from the Investigator, the Supervisor will review the file to ensure technical accuracy, thoroughness of the investigation, applicability of law, completeness of the report, and merits of the case. If legal action is being considered, the Supervisor will review the recommendation for consistency with legal precedents and policy impact. Such review will be completed as soon as practical after receipt of the file.
- B. Recommendation. If the Supervisor concurs with the analysis and recommendation of the Investigator, the concurrence will be documented by memorandum from the Supervisor to the RA or a concurrence block at the end of the FIR, and appropriate determination letters will be prepared for the RA's signature.

1. Withdrawal. For recommendations to approve withdrawal, the Supervisor will approve by signature on the withdrawal form. In cases where the complainant has failed to return a signed withdrawal form, the disposition letter to the complainant must clearly indicate that the disposition of the case is based on the complainant's verbal request for withdrawal. (See sample letters at the end of this chapter.)
  2. Dismissal. For recommendations to dismiss, the Supervisor will prepare letters of dismissal to the complainant with a copy to the respondent. The letters must include the necessary information regarding the parties' rights to objection or to appeal the findings, as appropriate under the various Whistleblower statutes. (See sample dismissal letters at the end of this chapter.)
  3. Settlement. For recommendations to approve settlement, the Supervisor will approve by signature on the Settlement Agreement. The Supervisor will also prepare for the RA's signature appropriate letters to the complainant and respondent forwarding copies of the settlement agreement, the Notice to Employees, the back pay check, etc. (Settlement procedures and settlement negotiations are discussed in detail in Chapter 6.)
  4. Deferral. In OSHA cases, for recommendations to defer to another agency decision or private settlement, the Supervisor will draft letters of deferral to the complainant for the RA's signature, sending a copy to the respondent. OSHA may defer to the determination of another agency or tribunal in accordance with 29 CFR 1977.18. (See sample deferral letter at the end of this chapter.)
  5. Merit Finding. For recommendations of merit in OSHA, AHERA and ISCA cases, the Supervisor will draft a memorandum from the RA to the Regional Solicitor recommending litigation. For recommendations under the remaining statutes, the Supervisor will prepare a letter and order to the respondent with a copy to the complainant. Please refer to the appropriate chapters of this manual for details regarding the proper procedures under each law that provides for findings and orders.
  6. Further Investigation Warranted. If, for any reason, the Supervisor does not concur with the Investigator's analysis and recommendation or finds that additional investigation is warranted, the Supervisor will return the file for follow-up work.
- C. Legal Requirements. The Supervisor should confer with the Regional Solicitor or OIA for advice or consultation at this point, if necessary, or at other appropriate times during the conduct of the investigation to ensure that legal requirements are met. This is particularly important if preliminary, immediate reinstatement of the complainant is being ordered. The various statutes have different requirements, and a thorough understanding of the laws, regulations, policies, and due process rights is critical to the successful conclusion of a case.

**V. Regional Administrator's Determination.** Upon receipt of the case file from the Supervisor, the RA or delegate will review the recommendations and the file and sign the appropriate



letter of determination as prepared by the Supervisor or return the file for further clarification or additional investigation as appropriate. All letters of determination to both the complainant and respondent must be sent by certified mail, return receipt requested.

## **VI. Appeals.**

- A. Complainant Appeals and Objections. For cases in which the RA has made a non-merit determination and the case is dismissed, the complainant is given an opportunity to appeal the decision in accordance with the procedures established under each of the Whistleblower statutes. Appeals or objections must be in writing, with a copy to the RA, and must be submitted within the statutory time period.
  - 1. Upon receipt of the copy of the appeal, under OSHA, AHERA, and ISCA, the RA will immediately forward the original case file to the Director of the Directorate of Compliance Programs (DCP) for review by the Appeals Committee. A copy of the file will be retained by the Supervisor. The RA may furnish additional comment regarding the appeal at the time the file is forwarded.
  - 2. The Appeals Committee will review the file and any other documentation supplied by the complainant or the RA and issue a decision to sustain the appeal, deny the appeal or remand the case for additional investigation.
  - 3. Objections under the other statutes are heard *de novo* before a Department of Labor Administrative Law Judge.
- B. Respondent Objections. Respondents may object in cases filed under the STAA, EPA, ERA, and AIR21 statutes. As with complainant objections under these statutes, the case is heard *de novo* before an Administrative Law Judge. In the case of STAA complaints where the RA has found merit, the Regional Solicitor usually represents OSHA as prosecutor, and OSHA officials may be called upon to testify at the hearings. The complainant may also prosecute in STAA cases. In other cases, the RSOL ordinarily does not participate. However, RSOL has the right to participate as a party or as *amicus curiae* and may do so in appropriate cases.

## **VII. Approval for Litigation.**

- A. Cases recommending litigation under OSHA 11(c), AHERA, and ISCA will be forwarded to the RSOL for review and, where the RSOL so determines, litigation. If the RSOL determines that additional investigation is required, the Supervisor normally will assign such further investigation to the original Investigator. Cases rejected by the RSOL as inappropriate for litigation may be appealed to the OIA with a memorandum from the RA detailing the reasons for disagreement NOTE: Under AHERA, Complainants may also have a right of private action.
- B. Under ERA, EPA and AIR21, where OSHA is not normally a party, it may choose to intervene as a party or appear as *amicus* in an appropriate case. Where OSHA believes participation may be appropriate, such as cases involving novel legal issues, large numbers of employees, or employees unlikely to obtain private counsel, the RA may discuss with RSOL the possibility of participation by the Department in the case.



## **Sample Documents**

**from**

## **Chapter Four**

Complainant Withdrawal Request .....	<a href="#">4-6</a>
Complainant Withdrawal Confirmation Letter .....	<a href="#">4-7</a>
Respondent Withdrawal Confirmation Letter .....	<a href="#">4-8</a>
Complainant Dismissal Letter .....	<a href="#">4-9</a>
Respondent Dismissal Letter .....	<a href="#">4-10</a>
Complainant Settlement Letter .....	<a href="#">4-11</a>
Respondent Settlement Letter .....	<a href="#">4-12</a>
Deferral Letter .....	<a href="#">4-13</a>
Complainant Litigation Letter .....	<a href="#">4-14</a>
Respondent Litigation Letter .....	<a href="#">4-15</a>
Litigation Referral Memorandum .....	<a href="#">4-16</a>
Dismissal Letter After SOL Review .....	<a href="#">4-17</a>

# Sample Complainant Withdrawal Request

## COMPLAINT WITHDRAWAL REQUEST

This form is provided for the assistance of any complainant and is not intended to constitute the exclusive means by which a withdrawal may be registered with the U.S. Department of Labor.

The undersigned complainant wishes to withdraw the discrimination complaint, filed under Section 11(c) of the Occupational Safety and Health Act, Case Number 1-2345-02-001.

This withdrawal request is submitted voluntarily by the undersigned.

I understand that I have the right to a determination by the U.S. Department of Labor, subject to appeal, and I waive that right. \_\_\_\_\_  
(Initials)

\_\_\_\_\_  
(Complainant's Signature)

\_\_\_\_\_  
(Typed or Printed Name)

\_\_\_\_\_  
(Date)

Withdrawal Request Received By:

Withdrawal Request Approved By:

\_\_\_\_\_  
Regional Investigator                      Date

\_\_\_\_\_  
Regional Supervisor                      Date



Telephone:  
FAX:

## Sample Complainant Withdrawal Confirmation Letter Section 11(c) Complaint

Date

Mr. U. R. Complainant  
Street Address  
City, State ZIP

Re: ABC Company/Complainant/Case No. 1-2345-02-001

Dear Mr. Complainant:

Your request to withdraw your complaint in the above-captioned matter has been approved. With this withdrawal, the case in this matter is closed.

If at any time in the future you believe this office could be of assistance regarding possible discriminatory action taken against you by an employer because of the exercise of rights guaranteed employees under Section 11(c) of the Occupational Safety and Health Act, please feel free to contact this office by mail or telephone.

Sincerely,

Name  
Regional Administrator

cc: Respondent  
Attorney



**Telephone:  
FAX:**

## Sample Respondent Withdrawal Confirmation Letter Section 11(c) Complaint

Date

Mr. President  
ABC Company  
Street Address  
City, State ZIP

Re: ABC Company/Complainant/Case No. 1-2345-02-001

Dear Mr. President:

The complaint in the above-captioned matter has been withdrawn. With this withdrawal, the case in this matter is closed.

If at any time you have any questions or require any information regarding employee rights and employer responsibilities under Section 11(c) of the Occupational Safety and Health Act, please feel free to contact this office by mail or telephone.

Sincerely,

Name  
Regional Administrator

cc: Attorney



## Sample Complainant Dismissal Letter Section 11(c) Complaint

Date

Mr. U. R. Complainant  
Street Address  
City, State ZIP

Re: ABC Company/Complainant/Case No. 1-2345-02-001

Dear Mr. Complainant:

Your complaint of discrimination under Section 11(c)(1) of the Occupational Safety and Health Act, Public Law 91-596, has been investigated and the results thereof carefully considered.

As a result of the investigation, it appears that the burden of establishing that you were discriminated against in violation of the above-cited section of the Act cannot be sustained. For the reason given you by the investigator on the occasion of your closing conference, the evidence developed during the investigation was not sufficient to support a finding of a violation. Accordingly, we are dismissing your complaint.

Any appeal of this determination must be filed by letter with:

Director  
Directorate of Compliance Programs  
U.S. Department of Labor-OSHA  
200 Constitution Avenue, N.W.  
Room N 3603  
Washington, D.C. 20210

with a copy to:  
Regional Administrator  
U.S. Department of Labor-OSHA  
Street Address  
City, State ZIP

This appeal must be received at the U.S. Department of Labor in Washington, D.C., within 15 days from your receipt of this letter.

Sincerely,

Name  
Regional Administrator

cc: Attorney



**Telephone:  
FAX:**

## **Sample Respondent Dismissal Letter Section 11(c) Complaint**

Date

Mr. President  
ABC Company  
Street Address  
City, State ZIP

Re: ABC Company/Complainant/Case No. 1-2345-02-001

Dear Mr. President:

The complaint in the above-captioned matter has been dismissed by this office. However, the complainant is afforded the opportunity to file an appeal of this dismissal with the U.S. Department of Labor - OSHA, in Washington, D.C., within 15 days of the dismissal date. In the event that no appeal action is taken by the complainant, this case will be considered closed.

If at any time you have any questions or require any information regarding employee rights and employer responsibilities under Section 11(c) of the Occupational Safety and Health Act, please feel free to contact this office by mail or telephone.

Sincerely,

Name  
Regional Administrator

cc: Attorney





**Telephone:  
FAX:**

## Sample Complainant Settlement Letter Section 11(c) Complaint

Date

Mr. U. R. Complainant  
Street Address  
City, State ZIP

Re: ABC Company/Complainant/Case No. 1-2345-02-001

Dear Mr. Complainant:

Enclosed is your check from ABC Company in the amount of \$860.50, which represents payment in full for the back pay and compensatory damages incurred. Please cash the check promptly. Also enclosed for your records is a copy of the signed Settlement Agreement.

Upon full compliance with the terms of the settlement agreement, this office considers the matter closed. Please advise this office by mail or telephone if you have any further questions or concerns regarding your complaint.

Sincerely,

Name  
Regional Administrator

Enclosures: Check No. 11136  
Copy of Settlement Agreement

cc: Attorney



**Telephone:  
FAX:**

## Sample Respondent Settlement Letter Section 11(c) Complaint

Date

Mr. President  
ABC Company  
Street Address  
City, State ZIP

Re: ABC Company/Complainant/Case No. 1-2345-02-001

Dear Mr. President:

This is to acknowledge receipt of ABC Company's check in the amount of \$860.50, payable to Mr. I. M. Complainant in the above-referenced complaint. The check has been sent under separate letter to the complainant. Also enclosed for your records is a copy of the signed Settlement Agreement. Upon full compliance with the terms of the Settlement Agreement, this office considers the case closed.

We sincerely appreciate your cooperation in resolving this matter. If at any time you need information on employee rights and employer responsibilities under the statutes administered by the Occupational Safety and Health Administration, please feel free to contact this office by mail or telephone.

Sincerely,

Name  
Regional Administrator

Enclosure: Copy of Settlement Agreement

cc: Attorney



**Telephone:  
FAX:**

## Sample Deferral Letter Section 11(c) Complaint

Date

Mr. U. R. Complainant  
Street Address  
City, State ZIP

Re: ABC Company/Complainant/Case No. 1-2345-02-001

Dear Mr. Complainant:

This is to advise that pursuant to 29 CFR 1977.18(c), we are deferring our determination in the referenced case to the settlement reached between you and the ABC Company as a result of the grievance/arbitration process. It is our understanding that the company has returned you to your former position and paid all back wages due you as a result of your transfer. Therefore, we consider the matter closed.

If at any time in the future you believe this office could be of assistance regarding possible discriminatory action taken against you by an employer because of the exercise of rights guaranteed employees under Section 11(c) of the Occupational Safety and Health Act, please feel free to contact this office by mail or telephone.

Sincerely,

Name  
Regional Administrator

cc: ABC Company



**Telephone:  
FAX:**

## Sample Complainant Litigation Letter Section 11(c) Complaint

Date

Mr. U. R. Complainant  
Street Address  
City, State ZIP

Re: ABC Company/Complainant/Case No. 1-2345-02-001

Dear Mr. Complainant:

This is to advise that we have completed our investigation of your complaint of discrimination under Section 11(c) of the Occupational Safety and Health Act (OSH Act) and find reasonable cause to believe that a violation exists. Attempts to settle the matter with the respondent have been unsuccessful; and, therefore, we are referring your case to the Office of the Solicitor, recommending litigation.

An attorney in the Office of the Solicitor of Labor will be responsible for further actions in this matter. If you have any questions, please contact:

Solicitor's Name  
Office of the Regional Solicitor  
U.S. Department of Labor  
Address  
City, State ZIP  
Telephone number

Sincerely,

Name  
Regional Administrator

**U.S. DEPARTMENT OF LABOR**

**Occupational Safety and Health  
Administration  
Street Address  
City and State**



**Telephone:  
FAX:**

## Sample Respondent Litigation Letter Section 11(c) Complaint

Date

Mr. President  
ABC Company  
Street Address  
City, State ZIP

Re: ABC Company/Complainant/Case No. 1-2345-02-001

Dear Mr. President:

The above-referenced case has been referred to the Office of the Solicitor recommending litigation. An attorney in the Office of the Solicitor of Labor will be responsible for further actions in this matter. If you have any questions, please contact:

Solicitor's Name  
Office of the Regional Solicitor  
U.S. Department of Labor  
Address  
City, State ZIP  
Telephone number

Sincerely,

Name  
Regional Administrator



Telephone:  
FAX:

## Sample Litigation Referral Memorandum Section 11(c) Complaint

Date

MEMORANDUM FOR: Regional Solicitor

FROM: Regional Administrator

SUBJECT: ABC Company/Complainant/Case No. 1-2345-02-001

### MEMORANDUM IN SUPPORT OF LITIGATION

The subject case is forwarded for your consideration and appropriate action with a recommendation to pursue litigation. The case involves an apprentice carpenter who, after receiving a minor eye injury on the job, requested personal protective equipment from his employer. After the items were denied, the complainant called OSHA to inquire about an inspection. The telephone conversation was overheard by the prime contractor's supervisor who admits informing the complainant's supervisor and other contractors on the job. The complainant was fired about one hour after calling OSHA. The protected activity, respondent knowledge and a prompt discharge are documented by supporting evidence. Knowledgeable witnesses report that respondent's supervisor made derogatory statements and threats concerning the protected activity thus establishing a nexus between these events. You are referred to the Final Investigation Report for further details.



## Sample Dismissal Letter After SOL Review Section 11(c) Complaint

Date

Mr. U. R. Complainant

Street Address

City, State ZIP

Re: ABC Company/Complainant/Case No. 1-2345-02-001

Dear Mr. Complainant:

Your complaint of discrimination alleging a violation of Section 11(c) of the Occupational Safety and Health Act of 1970 (the Act) has been thoroughly reviewed by the Office of the Solicitor. As a result of the Solicitor's review, we have determined that there is insufficient evidence to support a finding of a violation of Section 11(c) of the Act by the respondent in this case. Therefore, the case was deemed unsuitable for litigation. Further proceedings in this matter are deemed unwarranted and the complaint is hereby dismissed.

Any appeal of this determination must be filed by letter with:

Director

Directorate of Compliance Programs

U.S. Department of Labor-OSHA

200 Constitution Avenue, N.W.

Room N 3603

Washington, D.C. 20210

with a copy to:

Regional Administrator

U.S. Department of Labor-OSHA

Street Address

City, State ZIP

This appeal must be received in Washington, D.C., within 15 days from your receipt of this letter.

Sincerely,

Name

Regional Administrator

# Chapter 5

## Report Writing and Case File Documentation

*Even the most thorough of investigations is of little value until the results are effectively communicated to others.*

- I. Scope.** This chapter sets forth the policies, procedures, and format for writing the Final Investigation Report (FIR) and for properly organizing and documenting the investigative case file. Composition of Secretary's Findings and Orders is also addressed.
- II. Screened Complaints.** In cases which are not docketed after the initial screening, the file arrangement of materials as outlined below need not be followed. Rather, a memorandum to file will be prepared documenting the discussion with the complainant and the reasons why the case is not appropriate for investigation. A letter to the complainant will be prepared for the RA's signature confirming the administrative closure of the complaint.

### III. Case File Organization.

- A. As part of the case docketing process, the Supervisor will prepare an original case file for assignment to the Investigator and a copy of the file, which will be placed in an "open cases" file as backup to the original.
- B. Upon assignment, the Investigator normally receives a standard case file containing the OSHA-82 or 87, screening notes, transmittal documents, assignment memorandum, copies of initial correspondence to the complainant and respondent, and any evidentiary material initially supplied by the complainant. The file will be organized with the transmittal documents and other administrative materials on the left side and any evidentiary material on the right side. Care should be taken to keep all material securely fastened in the file folder to avoid loss or damage.
1. Evidentiary material normally will be arranged as follows:
    - a. Investigator's rough notes
    - b. Telephone log
    - c. Original complaint (Form OSHA-82, OSHA-87, or letter)
    - d. Documents from OSHA or other agency enforcement files
    - e. Complainant's signed statement
    - f. Remaining evidence (statements, records, etc., in logical sequence)
  2. Separation of Materials. Evidentiary materials will be separated by means of blank paper dividers with a number index tab at the bottom. Tabs will be numbered



consecutively using Arabic numbers from left to right starting at the bottom. Only the items of evidence contained on the right side of the file folder need be tabbed. A Table of Contents identifying all the evidentiary material by exhibit must be placed on top to aid review of the case file.

3. Administrative materials will be secured on the left side of the case file, and may be placed in the file as they are generated or received.
4. Table V-1 depicts a typical case file.

<b>Table V-1: Case File Organization</b>		
<b>Left Side Administrative Materials</b>	<b>Tab Number</b>	<b>Right Side Evidentiary Materials</b>
Assignment Memorandum	1	Rough Notes
Complainant Notification	2	Telephone/Activity Log
Respondent Notification	3	Letter of Complaint
Designation of Representative	4	OSHA-7
Letter to Attorney	5	Complainant's Statement
Determination Letter	6	CSHO Statement
Appeal Letter	7	Witness Statement
Appeal Determination	8	Witness Statement
	9	Attendance Record
	10	Supervisor's Statement
	11	Closing Conference Memo
	12	Final Investigation Report
		Table of Contents

#### **IV. Final Investigation Report.**

- A. Effective Communication. One of the primary skills required of a Whistleblower Investigator is the ability to present the findings in a clear and succinct manner that effectively communicates the results of the investigation to the reader of the report. The general format of the FIR will be as set forth below. It shall be a memorandum addressed to the Supervisor. (See sample FIR at the end of this chapter.)

B. FIR Format. As shown in the sample, format for the FIR is as follows:

1. Date Complaint Filed. Indicate the actual date that the complaint was filed.
2. Complainant. Include full name, mailing and street address, telephone number, fax number, and e-mail address of the complainant.
3. Represented by. Identify the complainant's attorney or other designated representative, mailing address, telephone number, fax number, and e-mail address, if applicable.
4. Respondent. Include the full name, mailing and street address, telephone number, fax number, and e-mail address of the respondent.
5. Represented by. Identify the respondent's attorney or other designated representative. Include name, title, mailing address, telephone number, fax number, and e-mail address, if applicable.
6. Allegation. Give a brief account of the complainant's allegations; *e.g.*, "Complainant alleges she was discriminatorily discharged for refusing to work on an unsafe scaffold."
7. Defense. Give a brief account of the respondent's defense; *e.g.*, "Respondent claims the complainant was discharged for excessive absenteeism."
8. Coverage Data. Give a brief statement of the basis for coverage and a basic description of the company to include location of main offices, nature of primary business, and how interstate commerce is affected. If it is an AHERA, ISCA, STAA, EPA, ERA, or AIR21 case, delineate the information that brings the case under that statute (Gross Vehicle Weight Rating, number of passengers, complainant's job, etc).
9. List of Witnesses. List name, occupation, mailing and street address and telephone number of all witnesses interviewed, and list other known potential witnesses who were not interviewed.
10. Investigative Findings. Prepare a chronological narrative of events relating to the alleged discrimination as determined by the investigation. The Investigative Findings section should begin with descriptive background information on the work site and history of OSHA safety and health activity, if any, and flow from there through the events relating to the alleged discrimination. References should be made to the exhibit numbers of relevant information (and the location of the information within the exhibit, if necessary). References should be given with sufficient frequency to permit a reviewer of the file to easily locate the evidence supporting the findings. All exhibits should be referenced at some point in the Investigative Findings, or their relevance to the case should be questioned.
11. Analysis/Conclusions. Evaluate the facts presented in the Investigative Findings as they relate to the four elements of a violation. Questions of credibility and

reliability of evidence should be resolved and a detailed discussion of the essential elements of a violation presented. In cases recommending litigation, a discussion of the strengths and weaknesses of the case vis-a-vis respondent's possible defense should also be presented, as appropriate. Discuss the adequacy of the facts, legal principles involved, and anticipated trial problems.

12. Closing Conferences. Include the date of the conference, where it took place, the reasons given for a positive or negative finding, a description of the party's reactions to the findings, and any attempt by the party to offer any new evidence or witnesses. If the case is recommended for dismissal, mention that appeal rights and objection procedures were explained. If the case was settled, a description of the settlement may be used in lieu of the closing conference.

13. Recommendation. Give a short paragraph on the Investigator's recommendations for disposition of the case.

**V. Delivery of the Case File.** If the case file must be sent to the Supervisor by mail, it must be mailed certified, return-receipt-requested, in order to maintain the chain of evidence. Investigators will organize a filing system to monitor delivery and receipt of case files and to maintain accountability for the return receipt.

## **Sample Documents**

**from**

## **Chapter Five**

Final Investigation Report .....	<a href="#"><u>5-6</u></a>
Final Investigation Report .....	<a href="#"><u>5-8</u></a>
Backpay Calculation Sheet .....	<a href="#"><u>5-13</u></a>



Telephone:  
FAX:

## Sample Final Investigation Report

DATE

MEMORANDUM FOR: Name  
Supervisor

FROM: I.M. Investigator  
Regional Investigator

SUBJECT: ABC Company/John Doe/Case No. 1-2345-02-001

### FINAL INVESTIGATION REPORT

Date Filed: January 13, 2002, with IH Jane Doe at the Boston Area Office via telephone.

Complainant: John Doe  
Street  
City, State, Zip  
Telephone: (123) 456-7890

Represented By:  
NONE

Respondent: ABC Corporation  
Street  
City, State, Zip  
Telephone: (123) 456-7890

Represented by:  
Attorney  
Street  
City, State, Zip  
Telephone: (321) 456-7890

Allegation: *State briefly what the complainant's allegations are. For example, Complainant alleged that he was fired in reprisal for filing a complaint with OSHA in violation of Section 11(c) of the OSH Act.*

Defense: *State briefly what the Respondent's position is. For example, Respondent denies that it terminated the Complainant for filing an OSHA complaint and assert that the Complainant was discharged for his poor performance, i.e., being continually late in processing his billing statements.*

Coverage: *Give a brief statement of the basis for OSHA coverage and a basic description of the company. For example, what kind of company is this? What do they do? Interstate? SIC? Headquartered? Union? Number of employees? For example, Respondent is headquartered in Denver, CO, and has rental outlets throughout the western United*

States. Total employees - 17/Non Union. SIC 7512 - Passenger Car Rental and Leasing, Without Driver.

Witnesses: Name, Manager

Street

City, State, Zip

Telephone: (123) 555-4567

Name, Mechanic (unable to locate for interview)

Street

City, State, Zip

Telephone: (123) 555-4567

Investigative Findings:

*Tell the story of what happened in chronological order. Start off with a brief history of the company, its organizational structure, the complainant's position, background on the complainant, his/her engagement in protected activity. Work your way up to the events leading to the discriminatory act. Be sure to include your reference to the exhibit that supports your finding. For example:*

The Respondent, ABC Corporation, is an automobile rental/leasing company with headquarters located in Denver, Colorado. It has offices throughout the Midwest and Rocky Mountain states. The facility in question is located in Address, NowhereLand. It is managed by Ms. G, general manager. Mr. B is the office manager, and Mr. M is the shop foreman (Exs 4, 7, 8).

The Complainant was hired by the Respondent on April 3, 1982, as a Mechanic. His wage was \$5.75 an hour, and he worked 40 hours a week, Monday through Friday, without overtime. He reported to Mr. M (Ex 6).

According to the Complainant, on December 10 he informed Mr. M that it was unsafe for him to handle the XXX cleaning chemicals without wearing gloves and that it was improper and unlawful to dump these chemicals down the sewage drain. He said that in response, Mr. M told him, "Well, if you can't do the job, then I don't need you working here." The complainant said that at the time two other Mechanics were standing next to him. They were.....

According to Mr. M, on December 10, he.....

Analysis:

1. *Protected Activity:*
2. *Knowledge:*
3. *Adverse Action(Reprisal):*
4. *Nexus (Timing, Animus, Disparate Treatment):*

Closing Conference:

Recommendations:

Approved by:

\_\_\_\_\_  
I.M. Supervisor  
Supervisor

\_\_\_\_\_  
Date





Telephone:  
FAX:

## Sample Final Investigation Report

DATE

MEMORANDUM FOR: Abbott A. Costello  
Regional Supervisory Investigator

FROM: Charles E. Todd, Investigator

SUBJECT: O'Brien Drywall/Parker/9-000-93-000

### Final Investigation Report

Date Filed: October 24, 1993, with Area Director Andrew Bunt at the Long Beach, California Area Office.

Complainant: Patrick J. Parker  
Seventh Avenue  
Long Beach, CA 94000  
Telephone: (204) 123-4567

Represented By:  
None.

Respondent: O'Brien Drywall, Inc.  
9876 Oak Street  
Las Vegas, Nevada 56789  
Telephone: (101) 202-3303

Represented By:  
Edward E. Jones, Esq.  
Attorney at Law  
516 Quasar Street, S.W.  
Washington, D.C. 20020  
Telephone: (202) 798-1236

Allegation: Complainant alleges he was discharged in retaliation for calling OSHA.

Defense: Respondent claims that complainant was laid off to conform with the requirements of the union contract.

Coverage: O'Brien Drywall, Inc., a Nevada corporation, primarily engages in the installation of wallboard and insulation. It regularly performs work outside the State of Nevada.

List of Witnesses:

Patrick J. Parker - complainant; address above.

Rex Abner - business agent, Carpenter's Local 123; address below.



Kirk Kennedy - Assistant Business Agent, Carpenter's Local 123, 777 Front Street, Long Beach, CA 95000, telephone: 204-999-8222.  
Chet Nelson - ex-employee, Rural Route #0, Box 11, Long Beach, CA 9400, telephone: 204-222-4444.  
Harry S. Briggs - Superintendent, P.O. Box 15723, South Annex Station, Las Vegas, Nevada 56789, telephone: 101-455--5555.  
Joseph D. Martin -Superintendent, Yale Construction Company, 1089 East Hollywood Drive, Chicago, Illinois 64123, telephone: 333-456-7777.  
Douglas Ross - Steward, 989 South Pine, Long Beach, CA 94000, telephone: 204-345-7656.  
Thomas Johnson - ex-employee, 6767 West 34th Street, Long Beach, CA 94000, phone: 204-233-4433.  
Rick Dupree - ex-employee (not interviewed), address unknown  
Ted Sanders - telephone: 101-842-1842

### Investigative Findings:

The workplace involved is the construction site of a motel building (Park Place Motel) in Long Beach, California. Respondent is a drywall subcontractor contracted by Yale Construction Company to install steel wall studs, insulation, wallboard, and texturing. O'Brien Drywall's portion of the job started on September 20, 1977, and ended on November 14, 1977. Respondent's superintendent on the job was Harry S. Briggs. Briggs was responsible for all construction aspects of the job, including, hiring of employees, timely production, and acquisition of tools, supplies and materials (Ex. 4,5,6).

As work began, Briggs hired six journeyman carpenters, one apprentice carpenter, and an apprentice laborer. Four of the journeymen carpenters and the apprentice were hired out of Carpenter's Local 123 in Long Beach, CA. Briggs brought the other two journeyman carpenters with him from his headquarters location in Las Vegas, Nevada. The Local 123 union contract requires that an employer first hire two journeymen before hiring one apprentice and five additional journeymen for each additional apprentice. An employer, therefore, needs to employ seven journeymen before hiring a second apprentice (see attachment of union business agent at Exhibit 6) . Additionally, it should be explained that the above rule is designed to protect the jobs of journeymen carpenters. Apprentice pay is substantially less than journeyman pay, which may provide an incentive for employers to hire apprentices rather than journeymen, particularly where the work involved does not require much skill (Ex. 4,5,7).

According to the union business agents, Briggs attempted to hire a second apprentice, but Business Agent Abner informed Briggs that the journeyman/apprentice ratio was not sufficient to hire a second apprentice. Briggs then stated that he would bring additional journeymen over from Nevada with him over the weekend of October 15-16, and Abner dispatched Complainant Parker on Monday, October 17, 1977. Assistant Business Agent Kennedy visited the job site that same day; and, upon learning that Briggs had not hired the additional journeymen as promised, he asked Briggs what had happened. Briggs explained that he hadn't had time to get the additional men. Kennedy claims that he let it go at that and never again mentioned the ratio problem to Briggs (Ex 8, 9).

Parker was assigned to installing fiberglass insulation in the walls and ceiling with the other apprentice, Chet Nelson. While working overhead, Parker got fiberglass dust in his eyes and required the help of another carpenter, Rick Dupree, to flush his eyes with water. Parker then

asked Briggs for a pair of safety glasses and a respirator for protection against the dust. Briggs did not have safety glasses immediately available but gave Parker a pair of plastic goggles that he borrowed from the electrician. Parker attempted to use the goggles but claimed that they would fog up. He returned the goggles to the electricians' trailer later in the day and informed Briggs that they did not work. At the 2:30 p.m. break, Parker again asked Briggs for safety glasses and a respirator. Briggs asked Parker where he could purchase some, and Parker directed Briggs to a safety supply store nearby. The next day, Parker again asked Briggs for the protective equipment, but Briggs had not acquired any. Parker claims that he further asked Briggs at least twice daily for the personal protective equipment, but Briggs failed to supply it (Ex 4, 10).

On Wednesday or Thursday of the same week, Parker complained to a carpenter steward, James Crockett, about not being provided with the safety equipment and that the labor apprentice, Thomas (Sam) Johnson, was performing carpenter's work by cutting the insulation. Crockett informed Business Agent Abner of the complaint; and, since Abner was going out of town for the rest of the week, he instructed Assistant Business Agent Kennedy to handle the complaint. Kennedy telephoned the OSHA Area Office to check on the requirements for respirators and was informed that the respirators are not required for fiberglass dust as they are for asbestos. Kennedy then visited the job site and confronted Briggs on the job jurisdiction matter only. He did not mention the safety complaint to Briggs at that time (Ex 4, 8, 9 10).

After Kennedy left, Briggs called Parker and Nelson aside and asked them who had complained to the union. Parker said he had done it, and Briggs threatened that if Parker did anything like that again he would be terminated. Briggs told Parker that he worked for him, not the union. Parker then asked Briggs when he was going to get the safety equipment he asked for. Briggs told Parker that he was not going to get it for him anymore (Ex 8, 9, 10).

In his statement, Briggs claims that it was Nelson who had complained about the jurisdiction problem and that he only told Nelson that he "would appreciate it if he brought his problems to me first before going to the union." (Ex 10) Both Parker and Nelson also relate the confrontation as presented above. Also, there is some confusion as to when these events took place. Parker and Nelson are certain that it was on Friday, October 21 (Ex 8). Kennedy recalls that he went to the job site on Wednesday, October 19. Briggs claims that he does not remember the date. It would seem most likely that it was Friday because that date corresponds with Business Agency Abner being out of town; and, therefore, sending Assistant Business Agent Kennedy to handle the complaint (Ex 9).

Parker returned to work on Monday, October 24, and states that he again asked Briggs for the safety glasses and respirator, and Briggs again refused. At the 12:30 lunch break, Parker and Nelson went to a phone booth, and Parker telephoned the OSHA Area Office to inquire about the safety standards that might apply to his situation. Since it was the lunch hour, no one was presently at the OSHA Office to answer Parker's questions. Thus, at the 2:30 coffee break, Parker went to the prime contractor's trailer and called OSHA again. This time, he talked with Area Director Andrew Hunt. Hunt's notes reflect that the call was, in fact, made at that time. As a result of the call, a complaint was accepted under Section 8(f), and the job site was subsequently inspected. While Parker was placing the call, Yale Construction Company Superintendent Joseph Martin entered the trailer. Martin admits overhearing enough of the conversation to conclude that Parker was calling OSHA (Ex 11). Martin then went to Briggs and informed him of the incident. Martin further advised the other subcontractors that OSHA had been called. According to all witnesses contacted, the job site was immediately cleaned up in preparation for an inspection.

Briggs also admits that during the 2:30 break, when he asked of Parker's whereabouts, one of the workmen informed him that Parker was at the prime contractor's trailer calling OSHA (Ex 4, 12).

At approximately 3:45 p.m., Briggs presented Parker with his paycheck and told him that he was laid off. According to Parker, Briggs said he was going to have to go along with the "ratio thing" and further stated, "And I'll tell you another thing, nobody calls OSHA on me." Nelson recalls that after Briggs terminated Parker, Briggs made a comment to him (Nelson) something like, "What's with that guy anyhow?", to which Nelson simply shrugged his shoulders (Ex 4, 7).

The following morning (Tuesday, October 25, 1977) Briggs called the union hall and told Business Agent Abner that he was going to go along with the journeyman/apprentice ratio and lay off an apprentice. Abner quotes Briggs as then saying, "By the way, when that kid comes in, tell him that nobody calls OSHA on me." Abner states that the message was quite clear that Briggs was laying off Parker for calling OSHA (Ex 7, 9).

Regarding the journeyman/apprentice ratio, the records are somewhat confusing as to whether the proper ratio was ever met. As mentioned above, it is apparent that on October 17, the day Parker was hired, there were only six journeymen and two apprentices. However, it appears that two of the journeymen were later off work. Rick Dupree was absent for the week of October 24 to attend his wedding and honeymoon, and Bob Baker, who initially came with Briggs from Las Vegas, did not work the entire time. Union records in Long Beach are recorded on self-duplicating paper and cannot be legibly photocopied (Ex 13). The company declined to furnish records to this investigator. However, it is interesting to note that on October 24 the respondent requested the dispatch of two additional journeymen which would have made a proper ratio according to Business Agent Abner. Examination of the records indicates that since Dupree was absent, if Baker was also absent, the number of journeymen may have remained at six (Ex 13).

### Analysis

Based on the information revealed in the investigation, it appears that the respondent terminated the complainant in reprisal for his safety and health complaints and for calling OSHA. Such activity is protected under Section 11(c) and 29 CFR 1977.9(a) and (c). Parker complained to his superintendent, Briggs, on several occasions about his need for safety glasses and a respirator. This fact is acknowledged by Briggs, himself. Furthermore, Parker did, in fact, call OSHA from the job site to report his problem, which was translated into a formal complaint.

Respondent had knowledge of the call to OSHA as testified to directly by Superintendent Martin and by Briggs. Animus is evident by Briggs' comments about calling OSHA to Parker and Nelson at the time of Parker's termination and to Business Agent Abner the next day. Animus is further evidenced by Briggs' comments to Parker and Nelson during the jurisdiction confrontation the previous week. At that time, Briggs threatened to fire Parker if he caused anymore problems. Furthermore, Briggs terminated Parker within an hour of hearing that Parker had called OSHA.

Respondent's defense appears to be that Parker was laid off to conform with the union provision that required seven journeymen on the job before hiring a second apprentice. Briggs claims that the union complained to him on several occasions about the journeyman/apprentice ratio. However, Business Agents Kennedy and Abner claim that this was only mentioned once by Abner--at the time Briggs requested the second apprentice--and once by Kennedy on Parker's first day at the job. Even Briggs admits in his own statement that Kennedy "didn't make too much of a

fuss about it at the time..." Briggs claims that Kennedy mentioned the ratio a couple of more times when he visited the job site. Kennedy was actually at the job site only one other time, regarding the jurisdiction dispute, and denies mentioning the ratio problem at that time. Briggs' testimony may be further discredited by his claim that Nelson was the one he cautioned about complaining to the union. Parker, Nelson and the union business agents state that it was Parker. This investigator carefully questioned Briggs on this point, but Briggs insisted that it was Nelson (Briggs seemed very much ill at ease throughout the interview).

Closing Conference:

On November 5, 1977, this investigator met in person with Mr. Parker for the purpose of explaining the results of the investigation. Parker was informed that a violation of Section 11(c) appeared to have occurred incidental to his discharge at O'Brien Drywall and attempted informal settlement of the matter had been unsuccessful. It was explained that his case would now be forwarded to the Solicitor of Labor for review, and if that office concurred in our findings, the matter would be filed in U.S. District Court. Parker was advised that the review and court process could take considerable time. Parker expressed his appreciation for our efforts and acknowledged his understanding of the procedures that will follow in his case.

Recommendation:

On November 4, 1977, this investigator attempted settlement negotiation with Mr. John O'Brien, president of O'Brien Drywall, Inc. Parker earned \$8.73 per hour for 36 hours per week, and the initial settlement offer was for three weeks' wages (it is virtually impossible to determine how long Parker would have remained employed. Other carpenters began being laid off about October 31). Mr. O'Brien declined the offer and refused to consider settlement. He stated that he had beat the government before, and he would do it again. In consideration of the investigation findings, it is recommended that the case be forwarded to the Solicitor for litigation.

/s/Pat Griffin

PAT GRIFFIN  
Investigator, Region IX

Approved:

\_\_\_\_\_  
I. M. Supervisor

\_\_\_\_\_  
Date

# Sample Backpay Calculation Sheet

## Quarterly Backpay Computation for:

Period From: \_\_\_\_\_ To: \_\_\_\_\_

Year	Quarter	
		Gross Backpay \$ _____ Interim Earnings \$ _____ Less Expenses \$ _____ Net Interim Earnings \$ _____ Net Backpay for Quarter \$ _____ Interest at ____% = ____/Quarter x ____ Quarters = \$ _____
(ADD ADDITIONAL QUARTERS AS NECESSARY TO COMPUTE ALL LOSSES)		
		Gross Backpay \$ _____ Interim Earnings \$ _____ Less Expenses \$ _____ Net Interim Earnings \$ _____ Net Backpay for Quarter \$ _____ Interest at ____% = ____/Quarter x ____ Quarters = \$ _____
		Gross Backpay \$ _____ Interim Earnings \$ _____ Less Expenses \$ _____ Net Interim Earnings \$ _____ Net Backpay for Quarter \$ _____ Interest at ____% = ____/Quarter x ____ Quarters = \$ _____
		Gross Backpay \$ _____ Interim Earnings \$ _____ Less Expenses \$ _____ Net Interim Earnings \$ _____ Net Backpay for Quarter \$ _____ Interest at ____% = ____/Quarter x ____ Quarters = \$ _____

Total Net Backpay \$ \_\_\_\_\_  
 Total Interest \$ \_\_\_\_\_  
 Additional Claim \$ \_\_\_\_\_

Total Amount Owed \$ \_\_\_\_\_

Footnotes and/or other explanations:

**GROSS BACKPAY:** Total taxable earnings complainant would have earned during the quarter if she/he had remained in discharging employer's employment.

**INTERIM EARNINGS:** Total taxable earnings complainant earned from interim employment (other employers) during the quarter.

**EXPENSES:**

- (a) Incurred in searching for interim employment; e.g., mileage at the current IRS rate per driving mile, toll and long distance telephone calls, employment agency fees, other job registration fees, meals and lodging if traveled away from home, bridge tolls, moving expenses, etc., and/or;
- (b) Incurred as a condition of accepting and retaining interim job; e.g., special tools and equipment, safety clothing, union fees, employment agency payment, mileage for the greater distance than from discharging employer's location, special subscriptions, mandated special training and education costs, special lodging costs, etc.

**NET INTERIM EARNINGS:** Interim earnings reduced by expenses—

1. Compute and enter total interim earnings.
2. Subtract expenses from total interim earnings.
3. Enter difference at "Net Interim Earnings."

**NET BACKPAY:** Subtract "Net Interim Earnings" from "Gross Backpay" and enter difference at "Net Backpay for Quarter."

**INTEREST:** Begins with quarter in which the discrimination occurred.

1. Enter current annual percentage rate in the first blank.
2. Enter one-fourth the current annual percentage rate in the second blank.
3. Enter the number of quarters since the complainant's discharge. Include the quarter of the discharge but do not include the current quarter.
4. Multiply entries 2 and 3 and enter product in the fourth blank.
5. Multiply entry 4 times the "Net Backpay for Quarter" and enter the product in the fifth blank. This is the payable interest for the quarter.
6. Perform the above same calculations for each quarter from date of discharge to present. Nothing is owed during the quarter in which payment is made.

**ADDITIONAL CLAIMS:** Nontaxable fringe and other benefits; e.g., out-of-pocket medical expenses, vested fund restoration, profit sharing or stock purchase options, annuity adjustment, etc. These amounts are computed and paid separately from backpay with interest thereon but no withholding therefrom. Vested fund restitution (pension, health benefits, etc.) is paid directly to the particular funds.

# Chapter 6

## Settlement Agreements

*Resolution of complaints is best effected at the lowest possible level and at the earliest possible date.*

- I. Scope.** This section covers policy and procedures for the effective negotiation and documentation of settlement of meritorious cases at the Regional level.
- II. Settlement Agreement Policy.** It is OSHA policy to seek settlement of all cases determined to be meritorious prior to referring the case for litigation. Further, although OSHA will not, itself, seek settlement of cases in which a merit finding has not been reached, OSHA will make every effort to accommodate an early resolution of complaints in which both parties seek resolution prior to the completion of the investigation.

### **III. Early Voluntary Resolution.**

- A. Ideally, as with safety and health issues, employer/employee disputes should be resolved between the principals themselves to their mutual benefit without third-party interference. The Secretary favors voluntary resolution of disputes through alternative dispute resolution processes. It is also OSHA policy to defer to adequate privately negotiated settlement of such disputes, although such settlements must still be reviewed and approved by the Supervisor to ensure that the terms of the settlement are consistent with the purpose and intent of the Act.
  - 1. If the complainant and respondent settle the dispute between themselves or if settlement is reached through the grievance-arbitration process or other means prior to OSHA reaching a determination, the case may be concluded in one of two ways.
    - a. The complainant may wish to withdraw the complaint.
    - b. The RA may issue a determination letter deferring to the outcome reached among the parties.
  - 2. In either event, the case will be recorded in the IMIS as “Settled - Other”.
- B. On the other hand, OSHA should not enter into or approve settlements which do not provide fair and equitable relief for the complainant.

### **IV. Settlement Agreement Procedure.**

- A. Requirements. Requirements for all settlement agreements are:
  - 1. The investigative case file must address all elements of a *prima facie* allegation.

2. The file must list all appropriate relief at that juncture of the process and the relief obtained.
3. The settlement must contain all of the following core elements of a settlement agreement:
  - a. It must be in writing.
  - b. The employer must agree to comply with the relevant statute(s).
  - c. It must address alleged retaliation.
  - d. It must specify the relief obtained.
  - e. It must address a constructive effort to alleviate the chilling effect, such as the posting of the agreement or an equivalent notice, or fully explain why notice to remaining employees is not necessary.
4. Adherence to these "core" elements should not create a barrier to getting an early settlement and adequate remedy for the complainant, and concessions may sometimes be made. Exceptions to the above policy are allowable if approved in a pre-settlement discussion with the Supervisor.
  - a. All appropriate relief/damages to which the complainant is entitled must be documented in the file. If the settlement does not contain a make whole remedy, justification for such and the complainant's concurrence must be noted in the file and the Final Investigation Report.
  - b. In instances where the employee does not return to the workplace, the settlement agreement should make an effort to address the chilling effect the adverse action had on co-workers. Posting of the settlement agreement or a notice to employees may be a remedy, but may also be an impediment to a settlement. A respondent's refusal to post such a notice should not be allowed to prevent the achievement of an otherwise satisfactory agreement. Other efforts to address the chilling effect, such as company training, may be available and should be explored.
  - c. To facilitate settlement in the field, the preprinted Settlement Agreement and Notice to Employees may be utilized (Copies of the Notice and sample Settlement Agreements are included at the end of this chapter). The preprinted agreements should be used only as a field expedient; it is preferable to write settlement agreements tailored to the specific issues and requirements of the case.

B. Adequacy of Settlements.

1. Full Restitution. Exactly what constitutes "full" restitution will vary from case to case. The appropriate remedy in each individual meritorious case must be carefully explored and documented by the Investigator. One hundred percent relief should



be sought during settlement negotiations wherever possible. As noted above, concessions may be inevitable to accomplish a mutually acceptable and voluntary resolution of the matter. Restitution may encompass any or all of the following, and is not necessarily limited to:

- a. Reinstatement to the same or equivalent job, including restoration of accumulated seniority and benefits. If acceptable to the complainant, a respondent may offer front pay (an agreed upon cash settlement) in lieu of reinstatement.
- b. Wages lost due to the adverse action.

(NOTE: Unemployment compensation benefits may never be considered as a back pay offset.)

- c. "Front pay" is a term covering wage losses from the last date at which back wages are calculated to an agreed future date. Front pay may be used in lieu of reinstatement where an employer wishes to avoid reinstatement and the employee agrees (or the reverse). Absent the agreement of the employer, an employee typically is only entitled to front pay where the employment relationship is so poisoned that no reasonable person could return to work (like constructive discharge).
- d. Expungement of warnings, reprimands, or derogatory references resulting from the protected activity which may have been placed in the complainant's personnel file.
- e. Respondent's agreement to provide to the complainant a neutral reference to potential employers.
- f. Posting of a notice to employees indicating that the respondent agreed to comply with the relevant Whistleblower statute and that the complainant has been awarded appropriate relief.
- g. Compensatory damages, such as out-of-pocket medical expenses resulting from cancellation of a company insurance policy, expenses incurred in searching for another job, vested fund or profit-sharing losses, property loss resulting from missed payments.
- h. Pain and suffering. Such damages need some factual support, such as medical bills, the loss of a home, etc.
- i. One lump sum payment to be made at the time of the signing of the settlement agreement as agreed by the parties.

## 2. Punitive Damages.

- a. Punitive damages should be considered whenever a management official involved in the adverse action knew about the relevant whistleblower statute

before the adverse action (unless the corporate employer had a clear-cut, enforced policy against retaliation). Punitive damages should also be considered when the respondent's conduct is egregious, *e.g.* when a discharge is accompanied by previous harassment or subsequent blacklisting, when the complainant has been discharged because of his/her association with a whistleblower, when a group of whistleblowers has been discharged, or when there has been a pattern or practice of retaliation in violation of the statutes OSHA enforces.

- b. When an investigation uncovers evidence which could lead to a recommendation for punitive damages, the Investigator should advise the Supervisor as soon as possible in order to alert the RSOL of the egregious nature of the potential violation. If the RSOL agrees that such damages may be appropriate, further development of evidence should be coordinated with the RSOL.
    - c. When determining punitive damages, refer to the Section 11(c) case *Reich v. Skyline Terrace Inc.*, 977 F. Supp. 1141 (N.D. Okl. 1997). Circumstances which make a case more or less egregious than *Skyline*, as well as inflation, should be considered.
  3. Under the OSHA 11(c), AHERA, and ISCA statutes, when the complainant does not agree to become a party to a settlement which, in the Regional Administrator's opinion, is a fair and equitable settlement of all matters at issue and would effectuate the policies of the Act, settlement agreements may be effected between OSHA and respondents without the consent of the complainant. All unilateral settlement agreements must be personally reviewed and approved in writing by the Regional Administrator.
  4. Complaints filed under STAA, ERA, EPA, or AIR21 statutes may not be settled without the consent of the complainant. However, under STAA the RSOL can withdraw from prosecuting the case.
  5. In STAA, ERA, EPA, and AIR21 cases, any settlement agreement signed before the issuance of findings shall state that if either party fails to comply with the settlement agreement, OSHA may issue findings to which the parties may object, seek judicial enforcement of the settlement, or treat the failure to comply as a new case.
- C. Front Pay. If acceptable to the complainant, a respondent may offer front pay (an agreed upon cash settlement) in lieu of reinstatement.
- D. Documentation.
1. Although each agreement will, by necessity, be different in detail, the general format and wording of the sample agreements will be used.
  2. Investigators will document in the file, and reference in the FIR, justification for the restitution obtained. If the settlement falls short of a full remedy, reasons for

such must be explained, along with an explanation that the complainant is aware of his or her entitlement and has chosen to accept a lesser amount.

3. Back pay computations must be included in the case file, and referenced in the FIR, with explanations of calculating methods and relevant circumstances as necessary.
  4. The interest rate used in computing a monetary settlement will be the rate charged by the Internal Revenue Service (IRS) for underpaid taxes. This rate is determined by using the Federal short-term rate, established in the first month of each calendar quarter, plus three percentage points. Changes to the Tax Underpayment Interest Rate can be obtained by calling the IRS at 1-800-829-1040 or the Office of Investigative Assistance or scrolling through the releases at the IRS website: <http://www.irs.ustreas.gov/news/nandf.html>
- E. Enforcement. In all cases where there has been a settlement, either before or after the issuance of findings, and the employer fails to comply with the settlement, this failure may be treated as a new instance of retaliation and require the opening of a new case or it may be appropriate to confer with the Regional Solicitor's office to consider the possibility of issuing findings in the original case or direct enforcement of the settlement agreement, itself, in court. Depending on the nature of the case, one or the other option might be preferable.

## **Sample Documents**

**from**

## **Chapter Six**

Settlement Agreement . . . . .	<a href="#"><u>6-7</u></a>
Notice to Employees . . . . .	<a href="#"><u>6-8</u></a>
Respondent Settlement Confirmation Letter . . . . .	<a href="#"><u>6-9</u></a>
Complainant Settlement Confirmation Letter . . . . .	<a href="#"><u>6-10</u></a>

# Sample Settlement Agreement

In the matter of: John Doe v. ABC Corporation  
Case No. 1-2345-02-001

## SETTLEMENT AGREEMENT

The undersigned Respondent and undersigned Complainant, in settlement of the above matter and subject to the approval of the Regional Administrator, HEREBY AGREE AS FOLLOWS:

**POSTING OF NOTICE** -- Upon approval of this agreement, the Respondent will post immediately in conspicuous places in and about its facility, including all places where notices to employees are customarily posted, and maintain for a period of 60 consecutive days from the date of posting, copies of the Notice to Employees attached hereto and made a part hereof, said Notice to Employees to be signed by a responsible official of the Respondent and the date of actual posting to be shown thereon.

**COMPLIANCE WITH NOTICE** -- The Respondent will comply with all terms and provisions of said Notice to Employees.

**MAKE WHOLE** -- The Respondent will make whole the Complainant, John Doe, by:

1. Reinstating him to his former position, without loss in seniority or wages.
2. Providing back pay in the amount of \$1,000.00 which constitutes loss wages from June 1, through June 17, 2000.
3. Compensatory damages of \$200.00 which represents expenses incurred to find a new job.
4. Expunging all records relating to the disciplinary action taken on May 27, 2000.

**PERFORMANCE** -- Performance by the Respondent with the terms and provisions of the Agreement shall commence immediately after the agreement is approved.

This agreement in no way constitutes an admission by Respondent of wrongdoing or a violation of any statute administered by the Occupational Safety and Health Administration and nothing in this agreement may be used against Respondent except for the enforcement of its terms and provisions.

The complainant agrees that acceptance of this Agreement constitutes settlement in full of any and all claims against ABC Corporation arising out of his complaint filed with OSHA on June 5, 2000, and will cause the complaint to be closed.

---

Sue P. Visor  
ABC Corporation, Respondent

Date

---

John Doe  
Complainant

Approved By:

---

Name  
Supervisory Investigator

Date

# NOTICE TO EMPLOYEES

**PURSUANT TO A SETTLEMENT AGREEMENT  
APPROVED BY U.S. DEPARTMENT OF LABOR,  
OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION**



The employer agrees that it will not discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to the Occupational Safety and Health Act (OSH Act) or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.

The employer agrees that it will not advise employees against exercising rights guaranteed under the OSH Act, such as contacting, speaking with, or cooperating with occupational safety and health administration (OSHA) officials either during the conduct of an occupational safety and health inspection of the employer's facilities or in the course of an investigation.

The employer agrees that it will not intimidate employees by suggesting or threatening that employee contact, conversation, or cooperation with OSHA officials might result in closure of the employer's facilities, in loss of employment for the employees, or in civil legal action being taken against the employees.

---

President \_\_\_\_\_ Date \_\_\_\_\_  
ABC. Corporation

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE. THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST BE NOT ALTERED, DEFACED, OR COVERED BY OTHER MATERIAL.**



## Sample Respondent Settlement Confirmation Letter Section 11(c) Complaint

Date

Mr. President  
ABC Company  
Street Address  
City, State ZIP

Re: ABC Company/Complainant/Case No. 1-2345-02-001

Dear Mr. President:

I am in receipt of ABC Company's check for the amount of \$860.50 and payable to Mr. U. R. Complainant in the above-referenced complaint. The check has been sent under separate letter to the complainant. Also enclosed for your records is a copy of the signed settlement agreement.

We thank you for your cooperation in successfully resolving this matter. If at any time you need information on employee rights and employer responsibilities under the statutes administered by the Occupational Safety and Health Administration, please feel free to contact this office by mail or telephone.

Sincerely,

Name  
Regional Administrator

Enclosure: Copy of Settlement Agreement

cc: Attorney



## Sample Complainant Settlement Confirmation Letter Section 11(c) Complaint

Date

Mr. U. R. Complainant

Street Address

City, State ZIP

Re: ABC Company/Complainant/Case No. 1-2345-02-001

Dear Mr. Complainant:

Enclosed is your check from ABC Company in the amount of \$860.50, which represents payment in full according to the terms of the settlement. Please cash the check promptly. Also enclosed for your records is a copy of the signed settlement agreement.

Thank you for your cooperation in successfully resolving this matter. If at any time you need information on employee rights and employer responsibilities under the statutes administered by the Occupational Safety and Health Administration, please feel free to contact this office by mail or telephone.

Sincerely,

Name

Regional Administrator

Enclosures: Check No. 11136  
Copy of Settlement Agreement

cc: Attorney



# Chapter 7

## Section 11(c) of the Occupational Safety and Health Act Public Law 91-596

**I. Introduction.** Section 11(c) of the OSH Act mandates that, "*No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act....*"

**II. Regulations.** Regulations pertaining to the administration of Section 11(c) of the OSH Act are contained in 29 CFR 1977.

### **III. Coverage.**

- A. Any private sector employee of an employer affecting interstate commerce is covered by the Act. Public sector employees (those employed as municipal, county, state, or federal workers) are not covered by Section 11(c). **Exception:** On September 29, 1998, OSH Act coverage was extended to employees of the U.S. Postal Service (USPS). (Public Law 105-241.) USPS employees have protections for any protected activity subsequent to that date.
- B. Executive Order 12196 and 29 CFR 1960.46 require all federal agencies to establish procedures to assure that no employee is subject to discrimination or reprisal for the types of activities protected by Section 11(c). A Federal employee who wishes to file a complaint alleging discrimination due to occupational safety and health activity should be referred to the employee's personnel office and OSHA's Office of Federal Agency Programs for assistance in filing a complaint, as well as to the Office of Special Counsel of the Merit Systems Protection Board.

### **IV. Complaint Processing.**

- A. Complaint Filing. Section 11(c) Whistleblower complaints may be filed in any form (verbal, written, fax, etc.). Regardless of the form, the complaint will be recorded on a Form OSHA-82 or 87, which may be provided to the employer with the identity of the witnesses deleted as necessary.
- B. Timeliness. Section 11(c) complaints must be filed within 30 days of the date the complainant was notified of the adverse action. Certain extenuating circumstances which may extend the 30-day deadline are discussed in Chapter 2.
- C. Meritorious Complaints. Complaints which are determined to be meritorious and which cannot be settled at the Regional level will be forwarded to the Regional Solicitor with a recommendation for litigation. The entire case file must be included together with a brief memorandum from the Regional Administrator summarizing the case. The Supervisor will retain a copy of the case file.

- D. Appeals. For complaints which are dismissed by the Regional Administrator, the complainant is given the right to appeal this determination. Section 11(c) appeals are not specifically covered by statute or regulation, but are dealt with under long-standing OSHA policy and procedure. The appeal should be filed in writing within 15 days of the complainant's receipt of the region's dismissal letter, with copies to the RA and the Director of the Directorate of Compliance Programs. The case will be reviewed and a final decision made by the Appeals Committee, which consists of attorneys from SOL and OSHA officials assigned to OIA. The Appeals Committee may recommend litigation, return the case for additional investigation, or deny the appeal. The decision of the Appeals Committee, including a decision to deny an appeal, is final.

## **V. Relationship to State Plan States.**

- A. Section 18 of the OSH Act provides that any state which desires to assume responsibility for development and enforcement of occupational safety and health standards must submit to the Secretary of Labor a state plan for the development of such standards and their enforcement. Approval of a State plan under Section 18 does not affect the Secretary of Labor's authority to investigate and enforce Section 11(c) of the Act in any State. However, 29 CFR 1977.23 and 1902.4(c)(v) require that each state plan include an anti-discrimination provision as effective as OSHA's Section 11(c). Therefore, in state plan states, employees may file occupational safety and health discrimination complaints with either federal OSHA or the state or both.
- B. The regulation at 29 CFR 1977.23 also provides that OSHA may refer complaints of employees adequately protected by state plans to the appropriate state agency. It is OSHA's policy to refer all Section 11(c) complaints to the appropriate state plan where it has been determined that the state's discrimination program is operating effectively to adequately protect the employees. A state plan state's jurisdiction extends to employees of all private sector employers who are subject to the state's occupational safety and health standards enforcement program as well as to all state and local government employees. Complaints filed under the other eleven whistleblower statutes are under exclusive federal OSHA jurisdiction and may not be referred to the states.
1. Complaints received by federal OSHA which are under state plan jurisdiction normally will be referred to the state without screening by means of a referral letter. The complainant will be advised of the referral in writing. See the end of this chapter for sample referral letters.
    - a. The referral letter will include a notification that the complainant may file a Complaint About a State Plan Administration (CASPA) if he or she is dissatisfied with the conduct or outcome of the state's investigation.
    - b. Upon receipt of such a CASPA, OSHA will review the state's investigative file and conduct other investigation deemed necessary to determine if the state's investigation was adequate and that the determination is supported by the appropriate available evidence.

- 1) If the state's investigation is deemed adequate and meets the criteria established in 29 CFR 1977.18(a)(3), the complainant will be advised that OSHA defers its determination to the outcome of the state proceeding.
  - 2) If the state's investigation is inadequate, OSHA will advise the state of the specific deficiencies and request that the case be reopened and the deficiencies corrected, after which OSHA will defer to the outcome of the state.
  - 3) If, for any reason, the state fails to correct the deficiencies, and it is apparent that the complaint may be otherwise meritorious, OSHA will reassume jurisdiction of the complaint, investigate and issue its own determination.
- c. If the complainant indicates that he or she does not wish to file with the state or does not wish the state to investigate the claim, then the complaint will be received as a federal OSHA complaint and investigated as usual with no state involvement.
2. Complaints received by a state plan state which are under dual federal-state jurisdiction, *i.e.*, a private sector employer, will be investigated by the state and should not be referred to federal OSHA. Because employers in state plan states do not use the federal OSHA poster, the states must advise complainants of their right to file a federal complaint if they wish to maintain their rights to concurrent Federal protection. This may be accomplished through such means as an addition to the state safety and health poster, a checklist, handout, or letter of acknowledgment. Complaints which are not dually filed may still be reviewed by federal OSHA if a CASPA is filed, but such complaints may not be independently pursued by federal OSHA unless they have been timely filed with federal OSHA initially.

# **Sample Documents**

**from**

## **Chapter Seven**

Referral Letter . . . . .	<a href="#"><u>7-5</u></a>
Complaint Referred to a State Plan . . . . .	<a href="#"><u>7-6</u></a>



**Telephone:  
FAX:**

## Sample Referral Letter Section 11(c) Complaint

Date

Mr. State Designee  
Street Address  
City, State ZIP

Re: Discrimination Complaint - Mr. I.M. Complainant

Dear Mr. Designee:

In accordance with OSHA Instruction DIS .7, the enclosed safety and health discrimination complaint is being forwarded to your office because the alleged discrimination took place within the jurisdiction of the state of [State Name]. After the [name of state agency] has completed its investigation in this matter, please furnish us with a copy of the closing letter to the complainant. If we have not received a request for review of the matter within 15 calendar days of the date the complainant receives the closing letter, OSHA will defer to the state determination and close its files on the matter.

If you have any questions, please call me.

Thank you,

Name  
Regional Administrator

Enclosure



**Telephone:  
FAX:**

## Sample Complainant Acknowledgment Letter for an OSHA Complaint Referred to a State Plan State

Date

Mr. U. R. Complainant  
Street Address  
City, State ZIP

Re: ABC Company/Complainant

Dear Mr. Complainant:

This is to inform you that in accordance with OSHA Instruction DIS .7, we are referring your claim of safety and health discrimination against the ABC Company to the [name of state agency] because the alleged discriminatory act took place in an area falling within the jurisdiction of that agency.

Enclosed for your records is a copy of our letter referring your complaint to [state agency]. Should you have any concerns regarding [state agency]'s conduct of the investigation, you may request our office to review the matter. Such request must be made within 15 calendar days of the date you receive the state's closing letter to you. Also, such request will be treated as a Complaint About a State Plan Administration (CASPA) under the provisions of 29 CFR 1954.20, unless Federal prosecution of the case is deemed warranted.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

Name  
Regional Administrator

Enclosure

# Chapter 8

## Section 211 of the Asbestos Hazard Emergency Response Act (AHERA) Public Law 99-519, 15 U.S.C. 2651

**I. Introduction.** Section 211 of AHERA provides: "*(a) No State or local educational agency may discriminate against a person in any way, including firing a person who is an employee, because the person provided information relating to a potential violation of this title to any other person, including a State or the Federal Government.*

*(b) Any public or private employee or representative of employees who believes he or she has been fired or otherwise discriminated against in violation of subsection (a) may within 90 days after the alleged violation occurs apply to the Secretary of Labor for a review of the firing or alleged discrimination. The review shall be conducted in accordance with section 11(c) of the Occupational Safety and Health Act."*

**II. Regulations.** There are currently no administrative regulations regarding the whistleblower provisions of AHERA.

### **III. Coverage.**

A. The general provisions of AHERA are administered by the Environmental Protection Agency. Under Section 211 of AHERA, OSHA covers all employees, public or private, whether or not they are employed by a school, and any representatives of employees, who engage in the protected activity described in Section 211(a). Although the language of §211(a) covers "persons," §211(b) authorizes the Secretary of Labor to handle only discrimination against "employees." However, the employees need not be employees of state or local educational agencies. Persons whose protected activity involves asbestos in a school covered by AHERA will be advised that they may also have a private right of action under 20 U.S.C. §4018 and that they may wish to obtain private counsel. Persons who are not employees who allege discrimination in violation of §211 will be told that they have no rights to an OSHA investigation and that they may wish to obtain private counsel in order to bring a private action. The discrimination prohibition applies to state or local primary and secondary educational agencies only.

B. A state educational agency is the agency primarily responsible for the state supervision of public elementary and secondary schools. A local educational agency is any public authority controlling public elementary or secondary schools, including certain schools funded by the Bureau of Indian Affairs; the owner of any private, nonprofit elementary or secondary school building; and the governing authority of any school operated under the defense dependents' education system.

**IV. Protected Activity.** The only activity protected by AHERA is complaining to any person, including a state or federal agency, about asbestos in the covered schools or about the accreditation of a contractor or laboratory to do asbestos work under 15 U.S.C. §2646.

## **V. Complaint Processing.**

- A. Complaint Filing. AHERA Whistleblower complaints can be filed in any form (verbal, written, fax, etc.). Regardless of the form, the complaint will be recorded on a Form OSHA-82 or 87, which may be provided to the employer.
- B. Timeliness. AHERA complaints must be filed within 90 days of the date the complainant first becomes aware of the alleged discrimination. Certain extenuating circumstances which may extend the 90-day deadline are discussed in Chapter 2.
- C. Meritorious Complaints. Complaints which are determined to be meritorious and which cannot be settled at the Regional level will be forwarded to the Regional Solicitor with a recommendation for litigation. The entire case file must be included together with a brief memorandum from the Regional Administrator summarizing the case. The Supervisor will retain a copy of the case file.
- D. Appeals. For complaints which are dismissed by the Regional Administrator, the complainant is given the right to appeal this determination. AHERA appeals are not specifically covered by statute or regulation, but are dealt with under long-standing OSHA policy and procedure. The appeal should be filed in writing within 15 days of the complainant's receipt of the region's dismissal letter, with copies to the RA and the Director of the Directorate of Compliance Programs. The case will be reviewed and a final decision made by the Appeals Committee, which consists of attorneys from SOL and OSHA officials assigned to OIA. The Appeals Committee may recommend litigation, return the case for additional investigation or deny the appeal. The decision of the Appeals Committee to deny an appeal is final for the agency, although the complainant may have a private right of action.



# Chapter 9

## Section 7 of the International Safe Container Act (ISCA) Public Law, 46 App U.S.C. 1506

- I. Introduction.** Section 7(a) of ISCA provides: "*No person shall discharge or in any manner discriminate against an employee because the employee has reported the existence of an unsafe container or reported a violation of this chapter to the Secretary or his agents.*"

The International Safe Container Act establishes uniform structural requirements for intermodal cargo containers designed to be transported interchangeably by sea and land carriers, and moving in, or designed to move in, international trade.

- II. Regulations.** There are currently no administrative regulations regarding the whistleblower provisions of ISCA.

- III. Coverage.** The general provisions of ISCA are administered by the Department of Transportation. Under Section 7(a) of ISCA, the terms "person" and "employee" have the same meaning as under Section 11(c) of the OSH Act.

- IV. Protected Activity.** Protected activity under ISCA includes only reporting an unsafe intermodal cargo container, or a violation of ISCA, 46 App. U.S.C. 1501 *et. seq.*, which includes, among other things, procedures for the testing, inspection, and initial approval of containers to the U.S. Department of Transportation.

### **V. Complaint Processing.**

- A. Complaint Filing. ISCA Whistleblower complaints can be filed in any form (verbal, written, fax, etc.). Regardless of the form, the complaint will be recorded on a Form OSHA-82 or 87, which may be provided to the employer.
- B. Timeliness. ISCA complaints must be filed within 60 days of the date the complainant is notified about the adverse action. Certain extenuating circumstances which may extend the 60-day deadline are discussed in Chapter 2.
- C. Meritorious Complaints. Complaints which are determined to be meritorious and which cannot be settled at the Regional level will be forwarded to the Regional Solicitor with a recommendation of litigation. The entire case file must be included together with a brief memorandum from the Regional Administrator summarizing the case. The Supervisor will retain a copy of the investigative file.
- D. Appeals. For complaints which are dismissed by the Regional Administrator, the complainant is given the right to appeal this determination. ISCA appeals are not specifically covered by statute or regulation, but are dealt with under long-standing OSHA policy and procedure. The appeal should be filed in writing within 15 days of the complainant's receipt of the region's dismissal letter, with copies to the RA and the Director of the Directorate of Compliance Programs. The case will be reviewed and a

final decision made by the Appeals Committee, which consists of attorneys from SOL and OSHA officials assigned to OIA. The Appeals Committee may recommend litigation, return the case for additional investigation or deny the appeal. The decision of the Appeals Committee, including a decision to deny an appeal, is final.

# Chapter 10

## 49 U.S.C. §31105, the Whistleblower Provision of the Surface Transportation Assistance Act (STAA) Public Law 97-424

**I. Introduction.** Section 31105 provides, "*(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms or privileges of employment, because (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or (B) the employee refuses to operate a vehicle because: (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition. (2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.*"

**II. Regulations.** Regulations pertaining to the administration of Section 31105 of the STAA are contained in 29 CFR 1978.

**III. Coverage.** The general provisions of STAA are administered by the Department of Transportation, Federal Motor Carrier Safety Administration. Under Section 31101 (definitions) and Section 31105, employees of commercial motor carriers, including independent contractors who operate commercial motor vehicles, are protected from discrimination for safety and health activities similar to those protected by Section 11(c) of the OSH Act. To qualify for coverage the complainant must be an employee of a commercial motor carrier affecting commerce and involved in activities affecting the safety of a commercial motor vehicle. The key question on coverage is whether the complainant is an "employee" within the meaning of STAA.

- A. Employee. Any individual employed by a commercial motor carrier who, in the course of employment, directly affects commercial motor vehicle safety, including but not limited to:
1. A driver of a commercial motor vehicle (including an independent contractor while in the course of personally operating a commercial motor vehicle) who directly affects motor vehicle safety;
  2. A mechanic,
  3. A freight handler, or

4. Any individual, not an employer, who directly affects commercial motor vehicle safety.
5. For the broad definition of “state” see 49 U.S.C §31101(4).
6. The definition does not include employees of the United States, a state, or a political subdivision of a state.
7. For the purposes of Section 31143(c), which prohibits retaliation against employees reporting potential violations of Federal Motor Carrier Safety Administration regulations to the U.S. Department of Transportation nationwide, toll-free telephone system, the employee need only be an employee in the broad, generic sense.

B. Commercial Motor Carrier.

1. A person who holds himself out to the general public to provide motor vehicle transportation for compensation; or
2. A person who provides motor vehicle transportation for compensation under a continuing agreement; or
3. A person who is engaged in an enterprise other than transportation, and provides transportation of passengers, by motor vehicle, that is within the scope of, and in furtherance of that enterprise; or
4. A person who transports, by motor vehicle, property of which that person is the owner, lessee, or bailee if such transportation is for the purpose of sale, lease, rent, bailment, or in the furtherance of any commercial enterprise other than transportation.
5. It is not necessary in any of these categories to show that vehicles crossed state lines.

C. Commercial Motor Vehicle. Any self-propelled or towed vehicle used on the highway in commerce principally to transport cargo or passengers if the vehicle:

1. Has a gross vehicle weight rating (a measure of the vehicle's carrying capability as specified by the manufacturer) or gross vehicle weight of 10,001 or more pounds; or
2. Is designed to transport more than 10 passengers, including the driver; or
3. Is used in the transportation of material found by the Secretary of Transportation to be hazardous, and in a quantity requiring that the cargo be placarded, under regulations issued pursuant to the Hazardous Materials Transportation Act, as amended (49 U.S.C. 5103). (For a list of hazardous materials see 49 CFR Parts 170-189.)

D. In Commerce. This term applies to trade, traffic, commerce, transportation, or communication between any state and any place outside thereof, or affecting the commerce between these places. The "in commerce" test, which must be met in all STAA cases, is similar to the commerce test in OSHA cases. The test is met:

1. If any of the employer's vehicles travel out of state or were purchased or manufactured out of state;
2. If the goods or passengers conveyed came from out of state;
3. If fuel, tires, or vehicle parts came from out of state; or
4. If the vehicles used interstate highways or roads connecting with interstate highways.

#### **IV. Complaint Processing.**

A. Complaint Filing. STAA complaints may be filed orally or in writing.

B. Timely Filing. Section 31105(b)(1) provides that an employee must file a complaint within 180 days after the alleged violation occurs.

C. Receipt of Complaints.

1. Supervisors should review all complaints to determine whether occupational safety or health or vehicle safety ramifications are involved and refer such potential hazards to the appropriate agency.
2. All complaints from STAA-covered employees must be docketed, unless a voluntary withdrawal is requested by the complainant at the time of screening.
3. At the time of docketing, the respondent must be notified of its rights under 29 CFR 1978.103(b) and (c). See the end of this chapter for a sample notification letter.

D. Field Investigations. STAA complaints will be investigated in the same manner as Section 11(c) complaints with two significant exceptions.

1. 29 CFR §1978.103(b) provides that within twenty days of receipt of the complaint, the respondent may submit a written statement and documents and request a meeting with OSHA. At the meeting the respondent may be accompanied by counsel and any persons with information about the complaint who may make statements. At the meeting OSHA may present additional allegations.
2. 29 CFR §1978.103(b) provides that if preliminary, immediate reinstatement is being ordered, the investigator must again contact respondent and provide the substance of the relevant evidence supporting the finding in favor of complainant.

- a. To ensure respondent's due process rights under the Fifth Amendment of the Constitution this second notification is accomplished and documented by means of a letter (See sample notification letter at the end of this chapter).
  - b. The letter must describe the evidence relied upon to determine that a violation has occurred and provide copies of relevant documents, including sanitized witness statements. If there is no way, consistent with confidentiality, to sanitize the witness statements, summaries of their contents must be provided with as much detail as possible. The letter must also provide the respondent the opportunity to submit a written response, to meet with the investigator, and to present statements from rebuttal witnesses within 5 days of OSHA's letter or at a later agreed date if the interests of justice so require.
  - c. The RSOL must be consulted prior to issuing the "due process letter" and the preliminary orders involving immediate reinstatement.
- E. Findings and Preliminary Orders. In STAA cases the parties must be notified of the results of the investigation by issuance of written findings and preliminary orders (see example at the end of this chapter). The finding and preliminary orders will be prepared for the signature of the RA. The RA will send the STAA Finding or Finding and Preliminary Order to the parties by certified, return-receipt-requested mail. Receipts will be stapled to the file copy of the letters to maintain accountability.
1. Any party may object, in writing, to the Finding, Preliminary Order, or both. A written objection must be submitted to the RA, the Chief Administrative Law Judge, and the other parties within 30 days of receipt of the Finding and Order.
  2. On the same date that the complainant and respondent are notified, the original complaint and a copy of the Finding and Order, if issued, will be sent to the Chief Administrative Law Judge where they will be held pending any objection (See sample at the end of this chapter).
  3. If no objection is filed within 30 days of the receipt, the Findings and Preliminary Order will become final and not subject to judicial review.
  4. Regardless of whether an objection is filed by any party, any portion of a Preliminary Order requiring reinstatement will be effective immediately upon the receipt of the Finding and Preliminary Order. Enforcement of the Order is in U.S. District Court. If the complainant informs OSHA that the respondent has not complied with a preliminary reinstatement order, the RSOL must be immediately informed so that court proceedings may be initiated.
- F. Objection. Upon receipt of a timely objection from any party, the Chief Administrative Law Judge assigns the case to a judge who will, within seven days following receipt of the objection, notify the parties of the day, time and place of the hearing. Therefore, if merit findings are issued the file must be sent immediately to the RSOL for their appropriate action.

- G. Wording in Findings/Order. The letters of determination should be succinctly written setting forth only the minimum information necessary to support the conclusions reached. These are a few guidelines for the wording of findings and orders in meritorious cases.
1. Statements of witnesses who merely saw or heard about the operative events generally should not be discussed.
  2. Conflicting testimony should not be discussed.
  3. In merit cases, the employer's alleged legitimate reason for the adverse action should not be discussed.
  4. The preliminary order must not indicate that the stated restitution is the final amount that will be sought (to allow for the possibility that the case may not be immediately resolved at this stage). Rather, the wording should be stated in terms of earnings per hour covering the number of hours missed or other appropriate wage unit.
  5. In cases where the protected activity is the refusal to operate a vehicle in violation of a DOT regulation, the findings must cite the particular regulation (49 U.S.C. Parts 390 - 398). Of particular note are 49 CFR 392.2 (requiring drivers to observe state and local laws and regulations) and 49 CFR 392.6 (prohibiting a motor carrier from scheduling a trip in such a way as to require that the state or local speed limit be exceeded). The findings must cite any particular state or local law involved. The findings should also allege, if true, that the complainant refused to operate the vehicle because of a reasonable apprehension of serious injury to the employee or the public because of the unsafe condition of the vehicle. In both types of refusal to operate cases, the findings should state, if true, that the employee has sought from the employer, and failed to obtain, correction of the unsafe condition.
  6. The findings must cite 49 USC §31105 and the particular provision that describes the complainant's protected activity. For employees filing because they were discriminated against for using the hotline, the findings will cite 49 USC §31143.
- H. Timing of Findings. Section 31105(b)(2)(A) provides that the Secretary will conduct an investigation within 60 days of receipt of a complaint, and then notify the complainant and respondent of the Findings. While every effort will be made to notify affected parties of OSHA's determination within 60 days, there may be instances when it is not possible to meet the directory period set forth in Section 31105(b)(2)(A).
- I. Distribution of Findings to the U. S. Department of Transportation. When the RA issues the Secretary's Findings or Secretary's Findings and Order, a copy of the findings must be transmitted to the local Regional Director for the Federal Motor Carrier Safety Administration, U. S. Department of Transportation (DOT). Upon request, an agent of DOT may be permitted to review the investigative file and request copies of any supporting documents. The documents must be identified in writing with

a certification that they will not be disseminated outside DOT without the authorization of this agency.



## **Sample Documents**

**from**

## **Chapter Ten**

Complainant Notification Letter .....	<a href="#"><u>10-8</u></a>
Respondent Notification Letter .....	<a href="#"><u>10-9</u></a>
"Due Process" Letter .....	<a href="#"><u>10-11</u></a>
Findings and Preliminary Order Letter .....	<a href="#"><u>10-13</u></a>
ALJ Notification Letter .....	<a href="#"><u>10-16</u></a>
Motor Carrier Safety Administration Notification Letter .....	<a href="#"><u>10-17</u></a>



**Telephone:  
FAX:**

## Sample Complainant Notification Letter STAA Complaint

Date

Mr. U. R. Complainant  
Street Address  
City, State ZIP

Re: ABC Trucking Company/Complainant/Case No. 1-2345-02-001

Dear Mr. Complainant:

This is to acknowledge receipt of your complaint of discrimination under Section 31105 of the Surface Transportation Assistance Act, 49 U.S.C. §31105. Please save any evidence bearing on your complaint, such as notes, minutes, letters, or check stubs, etc., and have them ready when the investigator meets with you. It will be helpful for you to jot down a brief factual account of what has happened and for you to prepare a list of the names, addresses, and telephone numbers of the potential witnesses, together with a brief summary of what each witness should know, for the use of the investigator named below.

You are expected to cooperate in the investigation of your complaint and failure to do so may cause your complaint to be dismissed due to lack of cooperation on your part.

Sincerely,

Investigator:

I.M. Investigator  
U.S. Department of Labor - OSHA  
Street Address  
City, State ZIP

Name  
Supervisor

Telephone: 123-456-7890  
Fax: 123-456-7890



## Sample Respondent Notification Letter STAA Complaint

Date

ABC Company  
Street Address  
City, State ZIP

Re: ABC Company/Complainant/Case No. 1-2345-02-001

Dear Sir or Madam:

We hereby serve you notice that a complaint has been filed with this office by Mr. Horace Brown alleging a violation of the whistleblower provision of Section 31105 of the Surface Transportation Assistance Act of 1982, 49 U.S.C. §31105. A copy of the complaint is enclosed. We would appreciate receiving from you promptly a full and complete written account of the facts and a statement of your position with respect to the allegation that you have discriminated against Mr. Brown in violation of the Act.

Within twenty days of your receipt of this complaint you may submit to this agency a written statement and any affidavits or documents explaining or defending your position. Within the same twenty days you may request a meeting to present your position. The meeting will be held before the issuance of any findings. At the meeting you may be accompanied by counsel and by any persons who may make statements concerning the case.

If investigation provides this agency with reasonable cause to believe that Section 31105 has been violated and reinstatement of the complaint is warranted, you will again be contacted prior to the issuance of findings and a preliminary order, at which time you will be advised of the substance of the relevant evidence supporting the complainant's allegations, and you will be given the opportunity to submit a written response, to meet with the investigator and to present statements from rebuttal witnesses. Your rebuttal evidence shall be presented within five days of this agency's notification described in this paragraph or as soon thereafter as we may agree, if the interests of justice so require.

Attention is called to your right and the right of any party to be represented by counsel or other representative in this matter. In the event you choose to have a representative appear on your behalf, please have your representative complete the Designation of Representative form enclosed and forward it promptly. All communications and submissions should be made to the investigator assigned below. Voluntary adjustment of meritorious complaints can be effected by way of a settlement agreement. Your cooperation with this office is invited so that all facts of the case may be considered.

Sincerely,

Investigator:

I. M. Investigator

U.S. Department of Labor - OSHA

Street Address

City, State ZIP

Telephone: (123) 456-7890

Name

Supervisor

Enclosures: Copy of Complaint  
Designation of Representative

Telephone:  
FAX:Sample "Due Process" Letter  
STAA Complaint

Date

Mr/Ms. CEO/President/Owner

Respondent Name

Respondent Address

City, State, ZIP

RE: Respondent Name/Complainant Name/Complaint #

Dear Respondent:

Please be advised that the investigation into the above-referenced discrimination complaint is completed. There is reasonable cause to believe that [*Respondent Name*] has violated 49 U.S.C. 31105, the whistleblower provision of the Surface Transportation Assistance Act (STAA), and that preliminary reinstatement of Mr/Ms. Complainant is warranted. However, before the issuance of the Secretary's Findings and a Preliminary Order takes place, this letter notifies you of the relevant evidence that supports the allegations as developed during the course of the investigation.

As a preliminary matter, we note that you were served notice of the complaint allegation via Certified Mail, Return Receipt Requested, Article # [*INCLUDE # FROM CERTIFIED MAIL*] on [*DATE of DELIVERY*]. After being notified of this complaint, you were provided an opportunity to submit a written statement and other relevant documents explaining or defending your position. On [*DATE*], our office received your written response and supporting documents. You were also afforded an opportunity to meet with the Investigator to submit information related to this complaint, and to make available individuals who also had relevant information. Meetings with the Investigator, yourself, and other individuals took place on [*DATE(s)*].

OSHA investigated and gathered data concerning the complaint as was deemed appropriate. OSHA's investigation indicated the following:

1. Complainant was involved in protected activity on [*DATE*] when he/she [*DESCRIBE PROTECTED ACTIVITY*];
2. Respondent was aware of Complainant's protected activity because [*DESCRIBE WHY*];
3. Complainant was subjected to an adverse action when he/she was [*FIRED/LAID OFF/DEMOTED/HARASSED, or other forms of discrimination*]; and

4. It is reasonable to believe that the adverse action was motivated by Complainant's protected activity.

Copies of the witness statements, sanitized to protect the confidentiality of witnesses, are enclosed. [In lieu thereof, insert the following: Because there is no way to protect the confidentiality of witness[es], a summary of the witness' statement[s] is provided.

Pursuant to 29 CFR 1978.103(c), *Part 1978 – Rules for Implementing Section 405 of the Surface Transportation Assistance Act of 1982*, you are hereby notified of your opportunity to submit rebuttal evidence. Any information you submit will be considered.

You may submit a written response, meet with OSHA officials, and present statements from rebuttal witnesses. Counsel may appear and act on your behalf regarding this matter. **Please note that you have five (5) days from receipt of this notice to present any rebuttal evidence.** Failure to respond within the five (5) day period will result in the issuance of the Assistant Secretary's Findings and Preliminary Order providing relief including immediate reinstatement of the Complainant. If you cannot present the rebuttal evidence within 5 days we will arrange a mutually acceptable date, but you must contact us within the 5-day period.

You are also invited to an informal resolution of this complaint, and are encouraged to seriously consider this alternative. Any offer which you desire to propose will be referred to the Complainant. If you have any questions, please contact me at the telephone number or address listed above.

Sincerely,

Name  
Supervisor

Enclosures



## Sample Findings and Preliminary Order Letter STAA Complaint

[*Note: Writing in **bold italics** are notes for the Reader and should be deleted from the final Finding*]

Date

Mr. Respondent  
ABC Trucking Company  
Street Address  
City, State ZIP

*This letter is addressed to the Respondent because the complaint has merit. Dismissal letters should be addressed to Complainant with a copy to Respondent.*

RE: ABC Trucking Company/Complainant/Case No. 1-2345-02-001

Dear Mr. Respondent:

***Paragraph #1 and 2: Introductory paragraphs***

***(Par #1)*** This is to advise you that we have completed our investigation of the above-referenced complaint filed by Ms. Truck Driver against ABC Trucking Company under the employee protection provisions of 49 U.S.C. §31105 of the Surface Transportation Assistance Act (STAA). Complainant, Ms. Driver, claimed that Respondent, ABC Trucking Company, fired her in retaliation for refusing to operate one of its trucks which she alleged had an overweight load and would violate a motor carrier safety regulation.

***(Par #2)*** Following an investigation of this matter by a duly authorized investigator, the Secretary of Labor, acting through her agent, the Regional Administrator for the Occupational Safety and Health Administration, Region XX, pursuant to 49 U.S.C. 31105 of the STAA and Secretary's Order 3-2000, finds that it is reasonable to believe that Respondent violated 49 U.S.C. §31105.

***Paragraph #3, and #4: Jurisdiction***

***(Par. #3)*** Respondent is a person within the meaning of 1 U.S.C. §1 and 49 U.S.C. §31105. It is also a commercial motor carrier within the meaning of 49 U.S.C. §31101. Respondent is engaged in transporting wood chip products on the highways and maintains a place of business in City, State.

*(Par. #4)* Respondent hired Complainant, Ms. Truck Driver, as a driver of a commercial motor vehicle, *to wit*, a truck with a gross vehicle weight rating of 10,001 pounds or more. Complainant was employed by a commercial motor carrier and she drove Respondent's truck over highways in commerce to haul wood chips. In the course of her employment, Complainant directly affected commercial motor vehicle safety.

***Paragraph #5: Whether the complaint was timely filed.***

*(Par #5)* Complainant was discharged on or about April 15, 2001. On or about May 15, 2001, she filed a complaint with the Occupational Safety and Health Administration alleging that Respondent discriminated against her in violation of 49 U.S.C. §31105. This complaint was timely filed.

***Paragraphs #6 through 9: Findings***

*(Par. #6)* 49 U.S.C. §31105(a)(1)(B)(i) prohibits discharging or otherwise discriminating against an employee if the employee refuses to operate a vehicle because "the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health..."

***Note: Whenever the protected activity involves a refusal to operate a vehicle, both (a)(1)(B)(i), refusal to operate because operation would violate a U.S. DOT regulation, and (a)(1)(B)(ii), refusal to operate because of a reasonable apprehension of serious injury, should be carefully considered. If evidence supports both types of refusals, violations of both should be alleged.***

*(Par. #7)* Complainant refused to drive Respondent's truck on or about April 15, 2001, because her truck had an overweight load in excess of 94,000 pounds. Operating a truck with this load violates a state of Washington motor carrier safety regulation, RCW 46.44.041, "Maximum Gross Weights," which, in turn would violate 49 C.F.R. §392.1, which provides in pertinent part, "Every commercial motor vehicle must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated."

***Note: For every violation of 49 U.S.C. §31105(a)(1)(B)(i) the USDOT regulation which complainant refused to violate must be quoted. If complainant refused to violate a state or local law or regulation, that provision as well as 49 C.F.R. §392.1 must be quoted.***

*(Par. #8)* On or about April 15, 2001, Complainant told Respondent that the truck was over the legal limit. Thus, Complainant informed Respondent of the unsafe condition and Respondent had knowledge of Complainant's protected activity.

*(Par. #9)* On or about April 15, 2001, Respondent discharged complainant because she refused to operate a commercial motor vehicle because the vehicle was over the legal weight limit. Thus, Respondent violated 49 U.S.C. §31105(a)(1)(B)(i).

***Note: In merit cases, the findings must state that respondent violated a specified provision or provisions of STAA.***



***Paragraph #10 through 15: Preliminary Order***

***(Par. #10)*** Upon receipt of these Findings and Preliminary Order, Respondent shall immediately reinstate complainant to her former position with all the pay, benefits, and rights she had before her discharge.

***(Par. #11)*** Respondent shall pay Complainant back wages at the rate of \$10.50 per hour for a 40 hour workweek from the time of the discharge until Respondent makes the complainant a *bona fide* offer of reinstatement.

***Note: Back pay must be noted in terms of the amount per hour and the number of hours a week complainant would have worked, or other appropriate wage unit, not in terms of a lump sum.***

***(Par. #12)*** Respondent shall pay Complainant compensatory damages in the amounts of \$5,000.00 for mental pain and suffering due to the discharge, \$1,000.00 for payments to a mental health care professional for counseling related to the discharge, and \$500.00 for out-of-pocket medical expenses which Complainant would not have had to pay if she were still employed and receiving employer-paid health insurance.

***(Par. #13)*** Respondent shall pay Complainant interest in accordance with 26 U.S.C. §6621, which sets forth the interest rate for underpayment of federal taxes.

***(Par. #14)*** Respondent shall expunge any adverse references from Complainant's personnel records relating to the discharge and not make any negative references relating to the discharge in any future requests for employment references.

***(Par. #15)*** Respondent shall post the enclosed notice to all its employees acknowledging its obligations under STAA.

***Paragraph #16: Objection Notification***

***(Par. #16)*** Respondent and Complainant have 30 days from receipt of these Findings and Preliminary Order to file objections and request a hearing on the record, or they will become final and not subject to court review. Objections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, 800 K Street NW Suite 400, Washington, D.C. 20001 and with the Regional Administrator, [ provide address]

An objection does not stay Respondent's obligation to immediately reinstate the Complainant as ordered above.

Sincerely,

Regional Administrator

cc: Complainant  
Chief Administrative Law Judge  
Local Federal Highway Administration

**U.S. DEPARTMENT OF LABOR**

**Occupational Safety and Health  
Administration  
Street Address  
City and State**



**Telephone:  
FAX:**

**Sample ALJ Notification Letter  
STAA Complaint**

Date

Chief Docket Clerk  
Office of Administrative Law Judges  
U.S. Department of Labor  
800 K. Street, N.W., Suite 400  
Washington D.C. 20001-8002

Re: ABC Trucking Company/Complainant/Case No. 1-2345-02-001

Dear Ms. Clerk:

The above-referenced matter is a complaint of discrimination under Section 31105 of the Surface Transportation Assistance Act of 1982.

The complaint was investigated and was found to have no merit. A copy of the Assistant Secretary's Findings and Order (if any) is enclosed. Also, enclosed is the original complaint and copies of letters to the complainant and respondent advising them of their rights under the Act. These documents are provided in accordance with 29 CFR 1978.104.

In any litigation that may ensue as a result of an objection, the Assistant Secretary of Labor for Occupational Safety and Health will be represented by:

Name, Associate Regional Solicitor  
U.S. Department of Labor - Office of the Solicitor  
Street Address  
City, State ZIP

Sincerely,

Name  
Supervisor

Enclosures: (1) OSHA 82 (original complaint form)  
(2) Copy of Secretary's Findings  
(3) Copy of letters to Complainant and Respondent

**U.S. DEPARTMENT OF LABOR**

**Occupational Safety and Health  
Administration  
Street Address  
City and State**



**Telephone:  
FAX:**

**Sample Motor Carrier Safety Administration Notification  
Letter  
STAA Complaint**

Date

Mr. O.M. Manager, Operations Manager  
Western Resource Center  
Federal Highway Administration  
Street Address  
City, State ZIP

RE: ABC Trucking Company/Complaint/Case No. 1-2345-02-001

Dear Mr. Manager:

The U.S. Department of Labor has completed its investigation of the complaint in the above-captioned complaint filed under the provisions of the Surface Transportation Assistance Act. A copy of our findings is enclosed for your information.

Should you have any questions, please call.

Sincerely,

Name  
Supervisor

Enclosures:

- (1) Copy of Secretary's Findings
- (2) Copy of letter to Complainant and Respondent

# Chapter 11

## Environmental Protection Agency Statutes

### I. Introduction. There are six EPA statutes as follows:

- A. The Clean Air Act (CAA) regulates air emissions from area, stationary, and mobile sources; and authorizes the EPA to establish National Ambient Air Quality Standards to protect public health and the environment. Section 322 of the CAA provides, "*No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)-- (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan, (2) testified or is about to testify in any such proceeding, or (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this Act.*"
- B. The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) provides a federal "Superfund" to clean up uncontrolled or abandoned hazardous waste sites as well as accidents, spills, and other emergency releases of pollutants and contaminants into the environment. Section 10 of the CERCLA provides, "*No person shall fire or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has provided information to a State or to the Federal Government, filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.*"
- C. The Federal Water Pollution Control Act (FWPCA) sets the basic structure for regulating discharges of pollutants to water in the U.S. This Act makes it unlawful for any person to discharge any pollutant from a point source into navigable waters unless a permit is obtained under the Act. It also establishes water quality standards for contaminants in all surface water. Section 507 of the FWPCA provides, "*No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.*"
- D. The Safe Drinking Water Act (SDWA) protects the quality of drinking water in the U.S., and focuses on all waters actually or potentially designated for drinking water. Section 1450 of the SDWA provides, "*No employer may discharge any employee or*

*otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has--(A) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this subchapter or a proceeding for the administration or enforcement of drinking water regulations or underground injection control programs of a State, (B) testified or is about to testify in any such proceeding, or (C) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this subchapter."*

- E. The Solid Waste Disposal Act (SWDA) establishes regulations for plans and facilities involving the recovery of energy and other resources from discarded materials. Section 7001 of the SWDA provides, "*No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter or under any applicable implementation plan, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter or of any applicable implementation plan.*"
- F. The Toxic Substances Control Act (TSCA) was established to test, regulate, and screen all chemicals produced or imported into the U.S. This Act requires that any chemical that reaches the consumer market place be tested for possible toxic effects prior to commercial manufacturing. Any existing chemical that poses health or environmental hazards is tracked and reported under TSCA. Section 23 of the TSCA provides, "*No employer may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has-- (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter; (2) testified or is about to testify in any such proceeding; or (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.*"

**II. Regulations.** Regulations pertaining to the administration of the EPA statutes are contained in 29 CFR Part 24.

**III. Coverage.** The general provisions of these statutes are all administered by the Environmental Protection Agency. Under the provisions of the EPA statutes, employees are protected from discrimination for environmental related activities such as filing a complaint with the EPA, testifying at a proceeding under one of the statutes, or otherwise participating in activities related to the statutes.

- A. Administrative Review Board (ARB) Decisions. The ARB has issued a large number of decisions in EPA cases which are regularly provided to the field and which are available on the Office of the Administrative Law Judges' website. Investigators and Supervisors should regularly review the decisions to keep up-to-date on the status of the case law.

#### **IV. Complaint Processing.**

- A. Complaint Filing. EPA complaints must be filed in writing by the complainant or his or her authorized representative.
- B. Timely Filing. 29 CFR §24.3(b) provides that an employee must file a complaint within 30 days after the alleged violation occurs.
- C. Receipt of Complaints.
  - 1. Supervisors should review all complaints to determine whether occupational safety or health or environmental ramifications are involved and refer such potential hazards to the appropriate agency.
  - 2. All complaints from EPA-covered employees must be docketed, unless a voluntary withdrawal is requested by the complainant at the time of screening.
  - 3. A copy of the actual complaint letter shall be sent to the respondent with the notification letter and to the local office of the EPA. If potentially confidential witnesses are named in the complaint, they should be redacted. A copy of the 29 CFR 24 regulations should also be provided to the respondent. See the end of this chapter for samples of the notification letters.
- D. Field Investigation. EPA complaints will be investigated in the same manner as Section 11(c) complaints.
- E. Notice of Determination and Orders to Abate. In EPA cases the parties must be notified of the results of the investigation by issuance of a written notice of determination and an order to abate the violation (see example at the end of this chapter). The determination and order will be prepared for the signature of the RA. The RA will send the Notice of Determination or Determination and Order to Abate to the parties by certified mail, return receipt requested. Receipts will be stapled to the file copy of the letters to maintain accountability.
  - 1. Any party may object, in writing, to the Notice of Determination, Order to Abate, or both and request a hearing on the record. A written objection must be submitted to the RA, the Chief Administrative Law Judge, and the other parties within five business days of receipt. Due to the short time given to request a hearing, it may be appropriate to fax the parties a copy of the determination at the same time for their convenience.
  - 2. On the same date that the complainant and respondent are notified, the original complaint and a copy of the Finding and Order, if issued, will be sent to the Chief Administrative Law Judge where they will be held pending any request for hearing (See sample at the end of this chapter).

3. If no objection is filed within five business days of the receipt, the Notice of Determination and Order to Abate will become final and not subject to judicial review.
  4. The EPA statutes do not provide for preliminary, immediate reinstatement of the complaint.
- F. Objection. Upon receipt of a timely objection from any party, the Chief Administrative Law Judge assigns the case to a judge who will, within seven days following receipt of the objection, notify the parties of the day, time and place of the hearing. In EPA cases the parties must provide their own attorneys, and SOL attorneys normally are not involved in the litigation.
- G. Wording in Determination Letters. The letters of determination should be clearly written setting forth the information necessary to support the conclusions reached (See Chapter 10, paragraph IV.G. for a further discussion on the wording of the Findings and Order.). The Order to Abate must not indicate that the stated restitution is the final amount that will be sought (to allow for the possibility that the case may not be immediately resolved at this stage). Rather, the wording should be stated in terms of earnings per hour covering the number of hours missed or other appropriate wage unit.
- H. Timing of Findings. 29 CFR §24.4(d)(1) provides that the Secretary will conduct an investigation within 30 days of receipt of a complaint, and then notify the complainant and respondent of the findings. While every effort will be made to notify affected parties of the Secretary's determination within 30 days, there may be instances when it is not possible to meet the directory period set forth in the regulation.
- I. Distribution of Findings to the Environmental Protection Agency. When the RA issues the Secretary's Findings or Secretary's Findings and Order, a copy of the findings must be transmitted to the local Regional Director of the Environmental Protection Agency. Upon request, an agent of the EPA may be permitted to review the investigative file and request copies of any supporting documents. The documents must be identified in writing with a certification that they will not be disseminated outside EPA without the authorization of this agency.

## **Sample Documents**

**from**

## **Chapter Eleven**

Complainant Notification Letter .....	<a href="#"><u>11-6</u></a>
Respondent Notification Letter .....	<a href="#"><u>11-7</u></a>
EPA Notification Letter .....	<a href="#"><u>11-8</u></a>





Telephone:  
FAX:

## Sample Complainant Notification Letter EPA Complaint

Date

Mr. U. R. Complainant  
Street Address  
City, State ZIP

Re: ABC Company/Complainant/Case No. 0-0160-01-003

Dear Mr. Complainant:

This will acknowledge receipt of your complaint against ABC Company alleging a violation of Section 110(a) of the Comprehensive Environmental Response, Compensation, and Liability Act. Your complaint was received in this office on November 3, 2000. In accordance with the Secretary's Order 3-2000, the Occupational Safety and Health Administration has been delegated authority in this matter.

The Act requires the Secretary of Labor to notify the party named in the complaint about the filing of the complaint and to conduct an investigation into the alleged violations. I am providing the named party with a copy of your complaint and information concerning the Occupational Safety and Health Administration's responsibilities under the law. I have enclosed a copy of the pertinent section of the Act and a copy of the regulations, 29 CFR Part 24, for your information.

This case has been assigned to the investigator noted below, and you are requested to direct all communications and materials associated with this matter to the investigator. The investigator will be in touch with you in the very near future. Your cooperation in this matter is greatly appreciated.

Sincerely,

Investigator:

Name  
U.S. Department of Labor - OSHA  
Street Address  
City, State ZIP

Name  
Supervisor

Telephone: (123) 456-7890  
Fax: No. (123) 456-7890

Enclosures



## Sample Respondent Notification Letter EPA Complaint

Date

ABC Company  
Street Address  
City, State ZIP

Re: ABC Company/Complainant/Case No. 1-2345-02-001

Dear Sir:

This will notify you that the Occupational Safety and Health Administration has received a complaint from Mr. U.R. Complainant alleging discriminatory employment practices in violation of Section 110(a) of the Comprehensive Environmental Response, Compensation, and Liability Act. This complaint was received on November 3, 2000. In accordance with the Secretary's Order 3-2000, the Occupational Safety and Health Administration has been delegated authority in this matter. I have enclosed a copy of the complaint, a copy of the pertinent section of the Act, and a copy of the regulations, 29 CFR Part 24.

The Act requires the Secretary of Labor to conduct an investigation into the alleged violations. This case has been assigned to the investigator noted below, and you are requested to direct all communications and materials associated with this matter to the investigator. You will be given every opportunity to present any relevant information or evidence in this matter. Regulations provide that we are to complete our investigation of this matter within 30 days, and to that end we would appreciate an initial statement regarding your position or answer to the complaint as soon as possible.

Thank you for your cooperation in this matter.

Sincerely,

Investigator:

Name

U.S. Department of Labor - OSHA

Street Address

City, State ZIP

Name

Supervisor

Telephone: (123) 456-7890

Fax: (123) 456-7890

Enclosure

**U.S. DEPARTMENT OF LABOR**

**Occupational Safety and Health  
Administration  
Street Address  
City and State**



**Telephone:  
FAX:**

## Sample EPA Notification Letter EPA Complaint

Date

R.A. Ministrator, Regional Administrator  
U.S. Environmental Protection Agency  
Street Address  
City, State ZIP

Re: ABC Company/Complaint/Case No. 1-2345-02-001

Dear Mr. Ministrator:

The above-referenced matter is a complaint of discrimination under Section 110(a) of the Comprehensive Environmental Response, Compensation, and Liability Act.

Enclosed is a copy of the complaint in the above-captioned matter for your information and assistance. Complainant and Respondent are being notified of the investigative procedures of this office under separate cover.

If I can be of further assistance to you, please do not hesitate to contact me.

Sincerely,

Name  
Supervisor

Enclosure

# Chapter 12

## Section 211 of the Energy Reorganization Act of 1978

**I. Introduction.** Section 211 of the ERA provides, "*No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or person acting pursuant to a request of the employee)--(A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.); (B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer; (C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954; (D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended; (E) testified or is about to testify in any such proceeding or; (F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.*"

**II. Regulations.** Regulations pertaining to the administration of the Section 211 of the ERA are contained in 29 CFR Part 24.

**III. Coverage.** The general provisions of these statutes are all administered by the Nuclear Regulatory Commission and the Department of Energy.

### IV. Complaint Processing.

- A. Complaint Filing. ERA complaints must be filed in writing by the complainant or his or her authorized representative.
- B. Timely Filing. 29 CFR §24.3(b) provides that an employee must file a complaint within 180 days after the alleged violation occurs.
- C. Receipt of Complaints.
  - 1. Supervisors should review all complaints to determine whether occupational safety or health or nuclear safety or health ramifications are involved and refer such potential hazards to the appropriate agency.
  - 2. All complaints from ERA-covered employees must be docketed, unless a voluntary withdrawal is requested by the complainant at the time of screening.
  - 3. An investigation may not be conducted under ERA if the complaint, as supplemented through additional interviews of complainant, does not make a prima

facie showing that protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint.

4. A copy of the actual complaint shall be sent to the respondent with the notification letter and to the local office of the NRC or DOE. If potentially confidential witnesses are named in the complaint, they should be redacted. A copy of the 29 CFR 24 regulations should also be provided to the respondent. The letter to respondent shall state that any evidence it may wish to submit to rebut the allegations in the complaint must be received within five business days from receipt of the letter.
  5. Even where the complaint makes a showing of a *prima facie* case, an investigation shall not be conducted if clear and convincing evidence submitted by the employer shows that it would have taken the same unfavorable personnel action in the absence of the protected activity.
- D. Field Investigation. ERA complaints will be investigated in the same manner as Section 11(c) complaints.
- E. Notice of Determination and Orders to Abate. In ERA cases the parties must be notified of the results of the investigation by issuance of a written notice of determination and an order to abate the violation (see example at the end of this chapter). The determination and order will be prepared for the signature of the RA. The RA will send the Notice of Determination or Determination and Order to Abate to the parties by certified mail, return receipt requested. Receipts will be stapled to the file copy of the letters to maintain accountability.
1. Any party may object, in writing, to the Notice of Determination, Order to Abate, or both and request a hearing on the record. A written objection must be submitted to the RA, the Chief Administrative Law Judge, and the other parties within five business days of receipt. The objection must be filed by FAX, telegram, hand delivery, or next-day delivery service. (Due to the short time given to request a hearing, it may be appropriate to fax the parties a copy of the determination at the same time for their convenience.)
  2. On the same date that the complainant and respondent are notified, the original complaint and a copy of the Finding and Order, if issued, will be sent to the Chief Administrative Law Judge where they will be held pending any request for hearing (See sample at the end of this chapter).
  3. If no objection is filed within five business days of the receipt, the Notice of Determination and Order to Abate will become final and not subject to judicial review.
  4. The ERA statutes do not provide for preliminary, immediate reinstatement of the complainant at this stage of the proceeding. Immediate reinstatement is provided for after the ALJ proceeding, while the case is pending before the ARB.

- F. Objection. Upon receipt of a timely objection from any party, the Chief Administrative Law Judge assigns the case to a judge who will, within seven days following receipt of the objection, notify the parties of the day, time and place of the hearing. In ERA cases the parties must provide their own attorneys, and SOL attorneys normally are not involved in the litigation.
- G. Wording in Determination Letters. The letters of determination should be clearly written setting forth the information necessary to support the conclusions reached (See Chapter 10, paragraph IV.G. for a further discussion on the wording of the Findings and Order.). The Order must not indicate that the stated restitution is the final amount that will be sought (to allow for the possibility that the case may not be immediately resolved at this stage). Rather, the wording should be stated in terms of earnings per hour covering the number of hours missed or other appropriate wage unit.
- H. Timing of Findings. 29 CFR §24.4(d)(1) provides that the Secretary will conduct an investigation within 30 days of receipt of a complaint, and then notify the complainant and respondent of the findings. While every effort will be made to notify affected parties of the Secretary's determination within 30 days, there may be instances when it is not possible to meet the directory period set forth in the regulation.
- I. Distribution of Findings to the NRC or DOE. When the RA issues the Secretary's Findings or Secretary's Findings and Order, a copy of the findings must be transmitted to the local Regional Director of the Nuclear Regulatory Commission or the Director of the Department of Energy facility involved. In addition, for cases involving the NRC copies must be sent to the NRC national office at Nuclear Regulatory Commission, Office of Enforcement. Upon request, an agent of the NRC or DOE may be permitted to review the investigative file and request copies of any supporting documents. The documents must be identified in writing with a certification that they will not be disseminated outside the agency without the authorization of OSHA.

## **Sample Documents**

**from**

## **Chapter Twelve**

Complainant Notification Letter .....	<a href="#"><u>12-5</u></a>
Respondent Notification Letter .....	<a href="#"><u>12-6</u></a>
Nuclear Regulatory Commission Letter .....	<a href="#"><u>12-7</u></a>
Notice of Determination .....	<a href="#"><u>12-8</u></a>



Telephone:  
FAX:

## Sample Complainant Notification Letter ERA Complaint

Date

Mr. U. R. Complainant  
Street Address  
City, State ZIP

Re: ABC Nuclear, Inc./Complainant/Case No. 1-2345-02-001

Dear Mr. Complainant:

This will acknowledge receipt of your complaint against ABC Nuclear, Inc., alleging violations of Section 211 of the Energy Reorganization Act. Your complaint was received in this office on October 4, 2000. In accordance with the Secretary's Order 3-2000, the Occupational Safety and Health Administration has been delegated authority in this matter.

The Act requires the Secretary of Labor to notify the party named in the complaint about the filing of the complaint and to conduct an investigation into the alleged violations. I am providing the named party with a copy of your complaint and information concerning the Occupational Safety and Health Administration's responsibilities under the law. I have enclosed a copy of the pertinent section of the Act and a copy of the Regulations, 29 CFR Part 24, for your information.

This case has been assigned to the investigator noted below, and you are requested to direct all communications and materials associated with this matter to the investigator. The investigator will be in touch with you in the very near future. Your cooperation in this matter is greatly appreciated.

Sincerely,

Name  
Supervisor

Investigator:  
Name  
U.S. Department of Labor - OSHA  
Street Address  
City, State ZIP

Telephone: (123) 456-7890  
Fax: No. (123) 456-7890

Enclosures





**Telephone:  
FAX:**

## Sample Respondent Notification Letter ERA Complaint

Date

ABC Nuclear, Inc.  
Street Address  
City, State ZIP

Re: ABC Nuclear, Inc./Complainant/Case No. 1-2345-02-001

Dear Sir:

This is to notify you that the Occupational Safety and Health Administration has received a complaint from Mr. U.R. Complainant alleging discriminatory employment practices in violation of the of the Energy Reorganization Act. This complaint was received in this office on October 4, 2000. In accordance with the Secretary's Order 3-2000, the Occupational Safety and Health Administration has been delegated authority in this matter. I have enclosed a copy of the complaint, a copy of the Act, and a copy of the Regulations, 29 CFR Part 24.

Within five business days of your receipt of this complaint you may submit to this agency a written statement and any affidavits or documents explaining or defending your position. The Act requires the Secretary of Labor to conduct an investigation into the alleged violations. This case has been assigned to the investigator noted below, and you are requested to direct all communications and materials associated with this matter to the Investigator. You will be given every opportunity to present any relevant information or evidence in this matter. Regulations provide that we complete our investigation of this matter within 30 days, and to that end we would appreciate an initial statement regarding your position or answer to the complaint as soon as possible.

Thank you for your cooperation in this matter.

Sincerely,

Name  
Supervisor

Investigator:

Name  
U.S. Department of Labor - OSHA  
Street Address  
City, State ZIP

Telephone: (123) 456-7890  
Fax: (123) 456-7890

Enclosure

**U.S. DEPARTMENT OF LABOR**

**Occupational Safety and Health  
Administration  
Street Address  
City and State**



**Telephone:  
FAX:**

## Sample Nuclear Regulatory Commission Letter ERA Complaint

Date

Mr. A.C. Coordinator  
Allegations Coordinator  
Nuclear Regulatory Commission  
Street Address  
City, State ZIP

Re: ABC Nuclear, Inc./Complainant/Case No. 1-2345-02-001

Dear Mr. Coordinator:

Enclosed is a copy of the complaint in the above-captioned matter for your information and assistance. Complainant and Respondents are being notified of the investigative procedures of this office under separate cover.

If I can be of further assistance to you, please do not hesitate to contact me.

Sincerely,

Name  
Supervisor

Enclosure

cc: Director, Office of Enforcement, Rockville, MD



Telephone:  
FAX:

## Sample Notice of Determination ERA Complaint

[NOTE: The text in ***bold italics*** are notes for the Reader and should be deleted from the final Notice of Determination.]

May 24, 2001

Ms. Respondent  
Chief Executive Officer  
Nuke Power, Inc.  
Street Address  
City, State, ZIP

***This letter is addressed to the Respondent because the complaint has merit.***

RE: Nuke Power, Inc./RadTech/0-0130-01-099

Dear Ms. CEO:

***Introductory paragraph: cite applicable statute(s) and outcome.***

This is to advise you that we have completed our investigation of the above-referenced complaint filed by Mr. Rad Tech against Nuke Power, Inc., under the employee protection provisions of the Energy Reorganization Act (ERA) of 1974, 42 U.S.C. §5851. Complainant, Mr. Tech, claimed that Respondent, Nuke Power, Inc., fired him in retaliation for voicing nuclear safety concerns to the U.S. Department of Energy (DOE). The evidence supports a prima facie complaint and a merit finding. The respondent, Nuke Power, Inc., has not shown by clear and convincing evidence that the same unfavorable personnel action would have been taken against the Complainant, Mr. Tech, in the absence of his protected activities.

***Jurisdiction and timeliness of complaint.***

Respondent is a government contractor and performs decontamination and remediation work at the Red Hot Nuclear Power Plant located in Big Toe, Idaho. Complainant was hired as a Radiation Technician on August 1, 1999 to test samples from radioactive drums and lead the safety meetings. Complainant was discharged on December 23, 2000 and filed his discrimination complaint on May 20, 2001. This complaint was timely filed. The Complainant and respondent are covered under the provision of the ERA.

***Findings***

The Complainant was involved in protected activity. Complainant and respondent were seen disagreeing about taking samples from several radioactive drums. Further, Complainant was heard telling respondent that he would not falsify records in the log book because it would violate

nuclear safety regulations. Complainant was warned by Respondent that he was being a difficult employee, and “could find another job” if he did not change his behavior.

On November 30, 2000, Complainant filed a safety complaint with DOE’s Employee Concerns Division. Complainant informed DOE that respondent had not followed proper procedures when he took drum samples, and falsified records. Complainant claimed that respondent’s actions violated federal regulations. On December 3, 2000, DOE conducted an investigation into Complainant’s allegations of unsafe practices. DOE concluded that Complainant’s allegations had merit, and respondent was cited and fined for failing to follow radiation safety regulations. Respondent was warned that it may lose its contract with DOE if future violations occurred.

Respondent had knowledge of Complainant’s protected activity. On December 15, 2000, during a safety meeting, respondent informed its employees about DOE’s citations and fines. Respondent told the employees that Complainant had gone “outside the chain of command” by taking his concerns to the DOE. Respondent instructed its employees to bring any safety concerns directly to their immediate supervisor in order to “save DOE the trouble and expense of having to come here again.”

Respondent adversely treated Complainant when it discharged him on December 23, 2000. Respondent’s termination letter states that Complainant was fired “solely and exclusively for misconduct in the course of his employment by failing to follow the proper chain of command” in reporting possible safety violations. Respondent’s letter further stated that Complainant “should have voiced his concerns to his immediate manager or to a higher level manager in his chain of command” and that Complainant should have brought any “safety issues to us first, and if that was not agreeable he was free to seek employment elsewhere.”

Respondent’s treatment of Complainant is directly related to his protected activities. Respondent attempted to silence the Complainant by suggesting he find another job whenever he voiced concerns about violating nuclear safety regulations. A few days after DOE’s inspection, Respondent ridiculed the Complainant during a safety meeting and directed its employees to not bring safety concerns to DOE’s attention. Shortly thereafter, Respondent fired the Complainant for going “outside the chain of command” when he raised safety concerns. However, when Complainant used the “chain of command,” he was threatened with job loss. Respondent was not receptive to Complainant using the chain of command when raising safety concerns thus creating a chilling effect on Complainant.

Respondent has not provided a clear and convincing reason to justify discharging the Complainant. The preponderance of evidence indicates that, but for, the Complainant’s protected activities, he would not have been fired. Based on the aforementioned facts, the evidence indicates a violation of the employee protection provisions of the Energy Reorganization Act. The following actions are required to remedy the violation.

***Include an Order to Abate the Violation:***

**Order to Abate the Violation**

1. Waive the reinstatement requirement since Complainant has found comparable employment, and is not interested in returning to work for Respondent.

2. Pay back wages in the amount of \$8,200.00 plus interest, which reflects the amount the Complainant would have earned from December 23, 2000 until May 25, 2001, less any interim earnings.
3. Payment of Complainant's attorney's fees in the amount of \$2,951.00.
4. Pay compensatory damages in the amount of \$550.00.
5. Expunge Complainant's employment records of any reference to the exercise of his rights under Section 211 of the Energy Reorganization Act of 1974.
6. Removal from Complainant's employment records his letter of termination dated December 23, 2000. Respondent's records will reflect that Complainant resigned from his position effective December 23<sup>rd</sup>.
7. Provide a neutral employment reference, to include dates of employment, job title, and final wage rate, to all potential employers regarding the Complainant.
8. No future retaliation or discrimination directed against the Complainant in any manner for instituting or causing to be instituted any proceeding under or related to the ERA.
9. Post immediately the "Notice to Employees" in a conspicuous place in or about Respondent's facility, including all places where notices for employees are customarily posted, and maintain for a period of at least 60 consecutive days from the date of posting, said Notice to Employees to be signed by a responsible official of the Respondent and the date of actual posting to be shown thereon. Said Notice to Employees is attached.
10. Permanently display the federal Notice entitled, "*Your Rights Under the ERA*" in locations where employees can readily see it. Under 24.2 (d)(1), this Notice is to be prominently posted by any employer subject to the provisions of the Energy Reorganization Act of 1974. Copy of said Federal Notice is attached.

If you wish to appeal the above findings, you have the right to a formal hearing on the record. To exercise this right you must, within five (5) business days of receipt of this letter, file your request for a hearing by facsimile (fax), hand delivery, or overnight/next day delivery mail or telegram to:

Beverly Queen, Chief Docket Clerk  
Office of Administrative Law Judges  
U.S. Department of Labor  
800 K Street, NW, Suite 400  
Washington, D.C. 20001-8002  
Fax No. (202) 693-7365

Unless a request for appeal is received by the Administrative Law Judge within the five-day period, this notice of determination will become the Final Order of the Secretary of Labor. Complainant Rad Tech is being advised of the determination in this case and the right to a hearing. A copy of this letter has also been sent to the Chief Administrative Law Judge with your complaint. If you decide to request a hearing, it will be necessary for you to send copies of the request to Mr. Tech and to this office at the address noted in the above letterhead. After copies of

your request are received, appropriate preparations can be made. If you have any questions, please do not hesitate to call me at (206) 553-5930.

It should be made clear to all parties that the U.S. Department of Labor does not represent any of the parties in a hearing. The hearing is an adversarial proceeding in which the parties will be allowed an opportunity to present their evidence for the record. The Administrative Law Judge who conducts the hearing will issue a recommended decision to the Secretary based on the evidence, testimony, and arguments presented by the parties at the hearing. The Final Order of the Secretary will then be issued after consideration of the Administrative Law Judge's recommended decision and the record developed at the hearing, and will either provide for appropriate relief or dismiss the complaint.

Sincerely,

Regional Administrator

cc: Complainant

Chief Administrative Law Judge  
NAME, Attorney for Complainant  
NAME, Attorney for Respondent  
Manager, U.S. Department of Energy  
Office of Employee Concerns, Washington, D.C.

# Chapter 13

## Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21) Public Law 106-181, U.S.C.

- I. Introduction.** Section 519 of AIR21 provides, "*No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States; (2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States; (3) testified or is about to testify in such a proceeding; or (4) assisted or participated or is about to assist or participate in such a proceeding.*"
- II. Regulations.** Regulations pertaining to the administration of the Section 519 of the AIR21 are contained in 29 CFR 1979.
- III. Coverage.** The general provisions of these statutes are all administered by the Federal Aviation Administration. Under Section 519, employees of air carriers or their contractors or subcontractors are protected from discrimination for participating in activities relating to aviation safety in a manner similar to Section 11(c) of the OSH Act. To qualify for coverage the complainant must be a present or former employee of or applicant for employment with an air carrier or contractor or subcontractor of an air carrier, or an individual whose employment could be affected by an air carrier or contractor or subcontractor of an air carrier.
- A. Air Carrier. Air carrier means a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.
  - B. Contractor. Contractor means a person or company contracted by an air carrier which performs safety-sensitive function. It may include a company which manufactures aircraft or aircraft parts for sale to an air carrier.
  - C. Subcontractor. Subcontractor means a person or company contracted to perform work by a contractor as defined above. There may be several subcontractors or layers of subcontractors working for a contractor.

#### **IV. Complaint Processing.**

- A. Complaint Filing. AIR21 complaints may be filed orally or in writing. If a complaint is filed orally, it is important that the date of receipt be recorded in the file and that the substance of the complaint be transcribed in detail and read by or to the complainant for his concurrence, and signed if possible, to ensure that an accurate statement of the complaint is transmitted to the respondent.
- B. Timely Filing. Section 42121(b)(1) provides that an employee must file a complaint within 90 days after the alleged violation occurs.
- C. Receipt of Complaints.
  - 1. Supervisors should review all complaints to determine whether aviation safety or health ramifications are involved and refer such potential hazards to the Federal Aviation Administration. The FAA must be provided with a copy of all complaints under AIR21.
  - 2. All complaints from AIR21-covered employees must be docketed, unless a voluntary withdrawal is requested by the complainant at the time of screening.
  - 3. At the time of docketing, the respondent must be notified of the filing of the complaint, of the allegations contained in the complaint, and of the substance of the evidence supporting the complaint (sanitized to protect the identity of any confidential informants). Ordinarily this can be accomplished by providing a sanitized copy of the complaint. In addition, the respondent must be notified of its rights under 29 CFR 1979.104(b) and (c). The letter shall also state that any evidence it may wish to submit to rebut the allegations in the complaint must be received within ten days from receipt of the letter. In addition, respondent may request a meeting in that ten-day period.
  - 4. An investigation may not be conducted under AIR21 if the complaint, as supplemented through additional interviews of complainant, does not make a prima facie showing that protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint.
  - 5. Even where the complaint makes a showing of a prima facie case, an investigation shall not be conducted if clear and convincing evidence submitted by the employer shows that it would have taken the same unfavorable personnel action in the absence of the protected activity.
- D. Field Investigations. AIR21 complaints will be investigated in the same manner as Section 11(c) complaints with two significant exceptions.
  - 1. 29 CFR §1979.104(c) provides that within ten days of receipt of the complaint, the respondent may submit a written statement and documents and request a meeting with OSHA. At the meeting the respondent may be accompanied by counsel and any persons with information about the complaint who may make statements. At the meeting OSHA may present additional allegations.



2. 29 CFR §1979.104(e) provides that if preliminary, immediate reinstatement is being ordered, the investigator must again contact respondent and provide the substance of the relevant evidence supporting the finding in favor of complainant.
  - a. To ensure respondent's due process rights under the Fifth Amendment of the Constitution this second notification is accomplished and documented by means of a letter (See sample notification letter at the end of this chapter).
  - b. The letter must describe the evidence relied upon to determine that a violation has occurred and provide copies of relevant documents, including sanitized witness statements. If there is no way, consistent with confidentiality, to sanitize the witness statements, summaries of their contents must be provided with as much detail as possible. The letter must also provide the respondent the opportunity to submit a written response, to meet with the investigator, and to present statements from rebuttal witnesses within ten days of OSHA's letter or at a later agreed date if the interests of justice so require.
  - c. The RSOL must be consulted prior to issuing the "due process letter" and the preliminary orders involving immediate reinstatement.
- E. Findings and Preliminary Orders. In AIR21 cases the parties must be notified of the results of the investigation by issuance of written findings and preliminary orders in a manner similar to STAA findings (see example at the end of Chapter 10). The finding and preliminary orders will be prepared for the signature of the RA. The RA will send the AIR21 Finding or Finding and Preliminary Order to the parties by certified, return-receipt-requested mail. Receipts will be stapled to the file copy of the letters to maintain accountability.
  1. Any party may object, in writing, to the Finding, Preliminary Order, or both. A written objection must be submitted to the RA, the Chief Administrative Law Judge, and the other parties within 30 days of receipt of the Finding and Order.
  2. On the same date that the complainant and respondent are notified, the original complaint and a copy of the Finding and Order, if issued, will be sent to the Chief Administrative Law Judge where they will be held pending any objection.
  3. If no objection is filed within 30 days of the receipt, the Findings and Preliminary Order will become final and not subject to judicial review.
  4. Regardless of whether an objection is filed by any party, any portion of a Preliminary Order requiring reinstatement will be effective immediately upon the receipt of the Finding and Preliminary Order. Enforcement of the Order is in U.S. District Court.
- F. Objection. Upon receipt of a timely objection from any party, the Chief Administrative Law Judge assigns the case to a judge who will notify the parties of the day, time and place of the hearing. In AIR21 cases the parties must provide their own attorneys, and SOL attorneys normally are not involved in the litigation.

- G. Wording in Findings/Order. The letters of determination should be clearly written setting forth the information necessary to support the conclusions reached (See Chapter 10, paragraph IV.G. for a further discussion on the wording of the Findings and Order.). The Order must not indicate that the stated restitution is the final amount that will be sought (to allow for the possibility that the case may not be immediately resolved at this stage). Rather, the wording should be stated in terms of earnings per hour covering the number of hours missed or other appropriate wage unit. OSHA will also provide FAA with copies of the investigation report, and with any orders associated with the hearing or administrative appeal.
- H. Timing of Findings. Section 42121(b)(2)(A) provides that the Secretary will conduct an investigation within 60 days of receipt of a complaint, and then notify the complainant and respondent of the Findings. While every effort will be made to notify affected parties of the Secretary's determination within 60 days, there may be instances when it is not possible to meet the directory period set forth.
- I. Frivolous Complaints. The Act and regulations provide that if the Secretary determines that a complaint was filed frivolously, the respondent may be awarded reasonable attorney's fees not to exceed \$1,000, to be paid by complainant. Such fees will not be awarded unless specifically requested by the respondent. A complaint may be deemed frivolous if it is determined that it was filed in bad faith and wholly without a factual basis. Any award of attorney's fees to the respondent must be approved in writing by the Director of Compliance Programs.
- J. Distribution of Findings to the Federal Aviation Administration. When the RA issues the Secretary's Findings or Secretary's Findings and Order, a copy of the findings must be transmitted to the Flight Standards Division, FAA Headquarters, Federal Aviation Administration. Upon request, an agent of the FAA may be permitted to review the investigative file and request copies of any supporting documents. The documents must be identified in writing with a certification that they will not be disseminated outside FAA without the authorization of this agency.

## **Sample Documents**

**from**

## **Chapter Thirteen**

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## Sample Complainant Notification Letter AIR21 Complaint

Date

Mr. U. R. Complainant  
Street Address  
City, State ZIP

Re: ABC Airlines/Complainant/1-2345-02-001

Dear Mr. Brune:

This is to acknowledge receipt of your complaint of discrimination under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century (AIR Act), 49 U.S.C. 42121.

Please save any evidence bearing on your complaint, such as notes, minutes, letters, or check stubs, etc., and have them ready when the investigator meets with you. It will be helpful for you to jot down a brief factual account of what has happened and for you to prepare a list of the names, addresses, and telephone numbers of the potential witnesses, together with a brief summary of what each witness should know, for the use of the investigator, Name, address below.

You are expected to cooperate in the investigation of your complaint and failure to do so may cause your complaint to be dismissed due to lack of cooperation on your part.

Sincerely,

Investigator:

Name  
Street Address  
City, State ZIP

Name  
Supervisor

Telephone: (123) 456-7890  
Fax: (123) 456-7890



## Sample Respondent Notification Letter AIR21 Complaint

Date

ABC Airlines.  
Street Address  
City, State ZIP

Re: ABC Airlines/Complainant/Case No. 1-2345-02-001

Dear Sir or Madam:

We hereby serve you notice that a complaint has been filed with this office by Mr. U.R. Complainant under the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century (AIR21), 49 U.S.C. 42121. We would appreciate receiving from you promptly a full and complete written account of the facts and a statement of your position with respect to the allegation that you have discriminated against Mr. Complainant in violation of the Act.

Within ten days of your receipt of this complaint you may submit to this agency a written statement and any affidavits or documents explaining or defending your position. Within the same ten days you may request a meeting to present your position. The meeting will be held before the issuance of any findings and a preliminary order. At the meeting you may be accompanied by counsel and by any persons relating to the complaint, who may make statements concerning the case.

If investigation provides this agency with reasonable cause to believe that the Act has been violated and reinstatement of the complaint is warranted, you will again be contacted prior to the issuance of findings and a preliminary order, at which time you will be advised of the substance of the relevant evidence supporting the complainant's allegations, and you will be given the opportunity to submit a written response, to meet with the investigator and to present statements from rebuttal witnesses. Your rebuttal evidence shall be presented within five days of this agency's notification described in this paragraph.

Attention is called to your right and the right of any party to be represented by counsel or other representative in this matter. In the event you choose to have a representative appear on your behalf, please have your representative complete the Designation of Representative form enclosed and forward it promptly. All communications and submissions should be made to the investigator assigned below. Voluntary adjustment of meritorious complaints can be effected by way of a settlement agreement. Your cooperation with this office is invited so that all facts of the case may be considered.

Sincerely,

Investigator:

Name

U.S. Department of Labor - OSHA

Street Address

City, State ZIP

Name

Supervisor

Telephone: (123) 456-7890

FAX: (123)456-7890

Enclosures: Copy of Complaint  
Designation of Representative  
29 CFR Part 1979



## Sample FAA Notification Letter AIR21 Complaint

Date

Mr. Gene Kirkendall  
Air Transportation Inspector  
Flight Standards Division  
FAA Headquarters, Room 831  
800 Independence Ave., S.W.  
Washington, D.C. 20591

Re: ABC Airlines/Complainant/1-2345-02-001  
AIR21 Whistleblower Complaint

Dear Mr. Kirkendall:

I am enclosing for your information a complaint filed under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century (AIR21). This complaint is currently under investigation by the Occupational Safety and Health Administration.

Should you have any questions, please call Name at Phone Number.

Sincerely,

Name  
Supervisor

Enclosure: Copy of Complaint

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